No. 85-1699

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

LaSALLE NATIONAL BANK OF CHICAGO, as Trustee under Trusts Numbered 40244, 53645, 100385 and 100386, UNITY VENTURES, and WILLIAM ALTER,

Petitioners,

v.

THE COUNTY OF DuPAGE, a body politic, THE BOARD OF COMMISSIONERS OF DuPAGE COUNTY, a body politic, THE VILLAGE OF LISLE, a municipal corporation, and THE VILLAGE OF WOODRIDGE, a municipal corporation,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Can anticompetitive concerted action by local units of government be immunized from the federal antitrust laws by general state laws that simply allow such local units to cooperate or take joint action?

2. Under what circumstances, if any, does the state action antitrust immunity rule under *Parker v. Brown*, 317 U.S. 341 (1943), and this Court's recent decisions in *Community Communications Co. v. City of Boulder*, 455 U.S. 40 (1982), and *Town of Hallie v. City of Eau Claire*, 105 S.Ct. 1713 (1985), extend to concerted action by units of local government?

3. Are units of local government, who enter into agreements in restraint of trade, entitled to immunity from antitrust liability even though that conduct was not authorized by the state?

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners respectfully pray that a writ of certiorari issue to review the decision of the Court of Appeals for the Seventh Circuit entered in this proceeding on November 18, 1985.

OPINIONS BELOW

The decision by the District Court, attached hereto as Appendix A, is unreported. The Court of Appeals' opinion, attached as Appendix B, is reported at 777 F.2d 377 (7th Cir. 1985).

STATEMENT OF JURISDICTION

The Court of Appeals' decision was made on November 18, 1985. Plaintiffs received extensions of time to file a petition for rehearing until December 23, 1985. Plaintiffs' petition for rehearing and suggestion of rehearing *en banc* was filed on December 23, 1985. The petition was denied on January 16, 1986. That order is attached hereto as Appendix C.

This Court's jurisdiction is invoked under 28 U.S.C. §1254, and this petition has been filed in a timely manner under 28 U.S.C. §2101(c).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Because of the volume of the relevant constitutional and statutory provisions, the pertinent parts of the following provisions are reproduced in their entirety in Appendix D hereto:

Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§1, 2.

Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§15, 26.

Illinois Constitution, Art. VII, §10(a).

Ill.Rev.Stat. Ch. 24, §§7-1-1, 11-147-4, 11-149-1.

Ill.Rev.Stat. Ch. 34, §§3111, 3151, 3159.

Ill.Rev.Stat. Ch. 111½, §§1004(n), 1046(b).

STATEMENT OF THE CASE

This case brings to this Court the issue of first impression whether general state laws allowing units of local government to cooperate can be read to create broad immunity for anticompetitive concerted action by local government units even when the particular actions at issue are not authorized by state law.

Petitioners (hereinafter "plaintiffs") are the owners and developers of land in DuPage County, Illinois ("DuPage") in an unincorporated area contiguous to respondent Villages of Woodridge and Lisle. Plaintiffs claim that DuPage, Woodridge, and Lisle conspired to block plaintiffs' efforts to develop the land in question and to restrain competition among developers and also among local units of government in the residential and commercial development of the area. The District Court rejected the defense of state action immunity under *Parker v. Brown*, 317 U.S. 341 (1943), and this Court's recent decisions in *Community Communications Co. v. City of Boulder*, 455 U.S. 40 (1982), and *Town of Hallie v. City of Eau Claire*, 105 S.Ct. 1713 (1985).

On interlocutory appeal, the Court of Appeals for the Seventh Circuit held, on what it viewed as a "close question," that the state had sufficiently authorized the general type of concerted action in question, thereby immunizing the defendants from federal antitrust liability. The antitrust claim was ordered dismissed on the face of the complaint without the opportunity for discovery. Because there has been no discovery in this case nor any factual findings by the courts below, the legal issues must be decided based solely upon the allegations of the complaint, attached hereto as Appendix E.

The complaint alleges horizontal agreements among DuPage, Woodridge, and Lisle to divide and allocate the market for residential and commercial development, to refrain from competing with each other for development, and to refuse to deal with certain developers and to favor others. Like any horizontal, anticompetitive agreement, this was done to increase respondents' economic leverage in the market and the money they could derive from development through exploiting their monopoly power. In this instance, their anticompetitive concerted action has prevented plaintiffs from developing their land in unincorporated DuPage County near Woodridge and Lisle. Through their concerted action, respondents denied plaintiffs the zoning, sewage, and water essential for the planned development.

In 1970 plaintiffs sought from DuPage the special use zoning permit essential for their planned housing development. The permit was granted for one portion of the planned development, but not for plaintiffs' portion. Plaintiffs sought relief in the state courts. The state circuit court found the denial of the permit to be a violation of the Illinois Constitution as well as arbitrary and capricious, and the decision was upheld on appeal. *LaSalle National Bank v. County of DuPage*, 54 Ill.App.3d 387, 396, 369 N.E.2d 505, 512, 12 Ill.Dec. 8, 15 (2d Dist. 1977). The Illinois Appellate Court found the zoning action to have "little or no relation to the public health, safety and welfare of DuPage County." *Id.*, at 512. Plaintiffs have alleged that the initial denial of the necessary special use permit and the consequent delay in obtaining the permit were occasioned by the conspiracy among DuPage, Woodridge, and Lisle.

Plaintiffs approached Woodridge to obtain the necessary water for the development. Woodridge conditioned the provision of water upon its annexation of the development, but plaintiffs determined that the terms imposed were unacceptable. Plaintiffs then approached neighboring Lisle about obtaining water. However, Lisle refused to deal with the plaintiffs because the unincorporated land in question had been allocated to Woodridge under a 1978 agreement between Lisle and Woodridge dividing the unincorporated land between them for development purposes. Consequently, plaintiffs' efforts to obtain water through competition was precluded. They could obtain water only by agreeing to Woodridge's "monopoly price."

Plaintiffs had obtained the necessary permits for sewage service for their development, but that essential service was also blocked by another of respondents' agreements. DuPage, Woodridge, and Lisle had previously consolidated the ownership and management of their various sewage treatment facilities. DuPage had purchased the Villages' treatment facilities and agreed to provide sewage treatment service to them. However, each Village reserved the right to determine which users outside the Village would receive sewage treatment service from the plant that the Village had sold to DuPage. In 1979, the Illinois Environmental Protection Agency allocated a certain number of new sewage connections to DuPage. If plaintiffs had been allowed to compete for a sufficient amount of this new capacity, they could have proceeded with their development. Instead, DuPage, Woodridge, and Lisle divided these additional connections among themselves in an irrational manner which failed to serve a legitimate purpose. The allocations left only 28% of the new connections for unincorporated areas such as that in which plaintiffs'

land was located, which was insufficient for the development.[1]

Plaintiffs filed their complaint on October 25, 1982 in the Northern District of Illinois, Eastern Division, seeking damages, injunctive relief, and a declaratory judgment. The complaint was founded on the federal antitrust laws, and the District Court had jurisdiction under 28 U.S.C. §§1337 and 2201. The District Court denied defendants' motion to dismiss on September 23, 1983, and filed a memorandum opinion and order on January 16, 1984. (App. A, pp. 1-12.) On August 3, 1984, the District Court denied defendants' motion for reconsideration, but certified the decision for interlocutory appeal under 28 U.S.C. §1292(b). (App. A, p. 13.)

On September 19, 1984, the Court of Appeals granted leave to proceed as an interlocutory appeal under 28 U.S.C. §1292(b).

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[1] Respondents' allocation agreement was then embodied in a state court decree, of which plaintiffs were given no prior notice and no opportunity to be heard even though the agreement and decree in effect nullified plaintiffs' valid sewage permits. (App. B, p. 4.)

THE DECISIONS BELOW

The District Court denied the respondents state-action immunity from federal antitrust liability because it could not find the requisite state authorization of the concerted action they had undertaken to obstruct the development. Noting that the respondents relied upon general state constitutional or statutory provisions allowing units of local government to contract and cooperate with each other or to exercise powers jointly, it found that these very general provisions were indistinguishable from the home rule provisions found insufficient for immunity in *Community Communications Co. v. City of Boulder*, 455 U.S. 40 (1982), and not like the specific statutory authorization of the particular local government action immunized in *Town of Hallie v. City of Eau Claire*, 105 S.Ct. 1713 (1985). (App. A, p. 8.)

The Court of Appeals, although acknowledging that the case presented "a close question" and that respondents' concerted action was foreseeably anticompetitive, found that the state laws that authorized units of local government to exercise authority in the areas of zoning, sewage treatment and disposal, and water provision, combined with the general authorization to act cooperatively, were sufficient under this Court's decisions to confer complete state action antitrust immunity on respondents. The Court of Appeals ordered the complaint to be dismissed and all relief denied. (App. B, pp. 2, 15.)

REASONS WHY THE WRIT OF CERTIORARI SHOULD BE GRANTED

1. THE DECISION BELOW IS IN CLEAR CONFLICT WITH *CITY OF BOULDER* AND *TOWN OF HALLIE*

In *City of Boulder*, the city relied upon its general, broad home rule powers granted by state law to claim state action immunity from the federal antitrust laws. This Court rejected the claim, holding that conferring state action immunity upon a state's political subdivisions requires a showing that a specific state legislative provision has authorized the subdivision to undertake the action in question despite its foreseeably anticompetitive consequences. The general Colorado home rule provisions, in contrast, showed that the state "allowed its municipalities to do as they please * * *," 455 U.S. at 55, which was incompatible with state-action immunity.

The facts in *Town of Hallie* presented the other extreme: the city claiming antitrust immunity could point to a specific state statute authorizing precisely what was claimed to be the antitrust violation (granting sewage disposal services to unincorporated areas on the condition that the areas be annexed to the city). Moreover, the Wisconsin Supreme Court had immunized the city's conduct under the state antitrust laws because it found that the legislature "intended the City to undertake the challenged actions." 105 S.Ct. at 1719 n.8.

The decision below paradoxically holds that the general state authorization ruled insufficient in *City of Boulder* for immunity when conduct by *one* unit of local government is involved, can become sufficient authority when there is *concerted* action among two or more local units

of government, even though it is well established that such horizontal concerted action results in the greatest anticompetitive evils.

The conflict between the decision below and the *Boulder-Hallie* rule can readily be seen when each challenged action and the purported legislative justification for it are examined.

Water Provision. The agreement between Lisle and Woodridge to allocate plaintiffs' unincorporated land exclusively to Woodridge, which enabled Woodridge to condition provision of water upon annexation at an unacceptable "monopoly price," was justified by the Court of Appeals under two statutes and an Illinois constitutional provision. The first statute simply allows a municipality to annex a contiguous territory provided certain conditions are satisfied. Ill.Rev.Stat. Ch. 24, §7-1-1. The second statute merely provides that a municipality may extend its sewage and water system into specified areas outside its corporate limits as long as a majority of the owners of record in the area to be serviced petition for such service. *Id.*, §11-149-1. These statutes are far removed from the specific authorization found in *Town of Hallie* even for *unilateral* anticompetitive action by a city. To justify immunizing the *concerted* action of Woodridge and Lisle, the Court of Appeals relied upon Article VII, §10(a) of the Illinois constitution, which provides that:

> Units of local government * * * may contract or otherwise associate among themselves, with the State, with other states and their units of local government and school districts, and with the United States to obtain or share services and to exercise, combine, or transfer any power or function, *in any manner not prohibited by law or by ordinance* * * *. [Emphasis added.]

This very general constitutional provision cannot be distinguished from the home rule powers found insufficient for immunity in *City of Boulder*. The provision certainly does not approve foreseeably anticompetitive "cooperation" among local governments since it specifies that they must not violate other laws, which would include the federal antitrust laws.

Zoning. The Court of Appeals relied on only two statutes to find state authorization of respondents' anticompetitive agreement to deny plaintiffs a special use permit. The first statute contains the conventional general purposes and powers allowing the zoning authority to promote "the public health, safety, morals, comfort and general welfare * * *." Ill.Rev.Stat. Ch. 34, §3151. The second statute simply gives the county general authority "to cooperate" with other local units of government in the exercise of its zoning power. *Id.*, §3159. Again, these statutes do not even approach the specific authorization found in *Town of Hallie* for unilateral action.

But here, in sharp contrast to the Wisconsin Supreme Court's immunization of the city's conduct under state law in *Town of Hallie*, the Illinois courts held that the denial of the special use permit was unconstitutional as well as arbitrary and capricious, which definitively establishes that respondents' action was unauthorized by the state.[2] The

[2] Moreover, the concerted action of respondents to deny the needed zoning is not authorized by the broad zoning statutes relied upon below. As the Eighth Circuit has held:

> Even if zoning in general can be characterized as "state action," * * * a conspiracy to thwart normal zoning procedures and to directly injure the plaintiffs by illegally depriving them of their property is not in furtherance of any clearly articulated state policy. *Westborough Mall v. City of Cape Girardeau*, 693 F.2d 733, 746 (8th Cir. 1982), *cert. denied sub nom. Drury v. Westborough Mall*, 461 U.S. 945 (1983) (citations omitted.)

Court of Appeals tried to evade that conclusion by holding that it is sufficient that cooperative zoning decisions in general are state authorized and that it is irrelevant for immunity whether the decisions actually made are correct or improper. There is certainly no decision of this Court justifying that rule, which would in its breadth undoubtedly shield all local zoning decisions from the federal antitrust laws.

Sewage. The Court of Appeals relied upon four disparate statutory provisions to justify respondents' agreement to freeze plaintiffs out of any sewage service. One statute simply authorizes counties to construct sewage systems, to contract with other persons to provide sewage service, and to regulate and control the disposal of sewage. Ill.Rev.Stat. Ch. 34, §3111. Another of the statutes relied upon authorizes the Illinois Environmental Protection Agency to engage in planning in cooperation with units of local government in the prevention of pollution. Ill.Rev.Stat. Ch. 111½, §1004(n). A third statute provides that any county operating sewage works may adopt regulations for proportionate cost sharing and payment for sewage treatment services. Ill.Rev.Stat. Ch. 111½, §1046 (b). The final statute relied upon simply authorizes any municipality in a particular county to contract with that county for sewage services.

None of these statutes, taken separately or together, remotely justifies the concerted, anticompetitive action by respondents alleged herein. Indeed, the Court of Appeals appeared to rely instead on its conclusion, not based on the record in this case, that there is a general state policy allowing units of local government to cooperate to reduce water pollution which should shield respondents from the antitrust laws. (App. B, pp. 8-9.) This was improper.

Plaintiffs' complaint alleges that the *concerted* action had nothing to do with this assumed general policy. The IEPA had granted respondents a certain amount of sewage capacity. Whether that capacity was allocated through the free market or through horizontal allocation agreements could have no effect on pollution. The conspiracy was intended and operated to deny plaintiffs access to this existing sewage facility. Therefore, respondents' concerted action was necessarily based on a motivation other than reduction of water pollution. Respondents were "cooperating" simply to increase their economic gains from development by restraining competition.

Moreover, the lower courts should not be allowed to speculate, by something akin to judicial notice or otherwise without any factual inquiry, that there is an overriding state policy beyond specific statutes which justifies the anticompetitive action taken.

To immunize respondents' anticompetitive action here, the Court of Appeals wove together general powers to operate in specific areas into a supposed state charter to conspire. The result is, as in *City of Boulder*, that respondents are free "to do as they please * * *," 455 U.S. at 55, and clearly conflicts with this Court's decisions.

2. THIS COURT MUST DECIDE WHETHER IMMUNITY IMPLIED FROM STATE LAW CAN BE EXTENDED TO CONCERTED ACTION AMONG LOCAL UNITS OF GOVERNMENT THAT OTHERWISE VIOLATES THE FEDERAL ANTITRUST LAWS

This Court's recent decisions in the state action area have focused on allegedly anticompetitive action by a single unit of local government. *See City of Boulder*; *Town of Hallie*; and *Fisher v. City of Berkeley*, 106 S.Ct. 1045 (1986). While the District Court here refused to grant federal antitrust immunity to concerted action based upon

the general "cooperation" provisions described above, the Court of Appeals erroneously attempted to force this case into the *Boulder-Hallie* framework.

However, this Court has repeatedly held that horizontal action by competitors, through cartels or conspiracies to restrain trade, was the basic evil which the Sherman Act sought to eradicate. That legislative purpose led to the development of the various *per se* rules of antitrust liability whenever competitors agreed, for instance, on prices, on allocation of customers or territories, or to exclude customers or competitors. *See Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984).

In this case, the concerted action involved, if undertaken by private commercial entities, would have unquestionably been *per se* illegal as horizontal territorial or customer allocation and refusals to deal. The concerted nature of the violations should have been considered by the Court of Appeals, as it was by the District Court, in determining what rule of immunity should apply, but it was not. Whether *per se* liability is appropriate in such a governmental setting or not, the granting of dispositive immunity on the face of the complaint was erroneous, and a decision on immunity should certainly wait until the motivations, terms, and effects of the concerted action are explored sufficiently for a fair judgment of its anticompetitive impact.

3. THE COURT OF APPEALS IMPROPERLY GRANTED ANTITRUST IMMUNITY TO LOCAL UNITS OF GOVERNMENT EVEN THOUGH THEIR ACTION WAS NOT AUTHORIZED BY THE STATE

This Court's decisions on state action immunity applicable to local units of government have held that only specifically authorized action will be immune. Indeed, this Court has not yet decided a case in which the anticom-

petitive local government action was plainly unauthorized. There has not even been a hint that action that is not sufficiently authorized can still be immunized if the local units of government believed that what they were doing was sufficiently authorized. Yet, the Court of Appeals below, purporting to rely on *City of Boulder* and *Town of Hallie*, specifically held that the unauthorized zoning decision in this case would still be immunized from antitrust liability as long as respondents' general cooperation on zoning was authorized. That unsupportable holding obviously led to the Court of Appeals' similarly broad immunity decisions on the water and sewage issues. Under the new Seventh Circuit rule, as long as a local unit of government is authorized to cooperate with other local governments in making a certain *type* of decision, it does not matter whether the decision actually made was unauthorized.

The Court of Appeals put no limits on this broad immunity, which would improperly shield action taken in bad faith or with knowledge that it was unauthorized. In fact, it appears that as long as there is a broad cooperation provision in effect, units of local government can enter into whatever anticompetitive agreements they choose unregulated by the federal antitrust laws. Such immunity is unprecedented in the antitrust area and should not be allowed to stand without full review by this Court.

CONCLUSION

If the decision below is allowed to stand, *City of Boulder* will not control concerted, anticompetitive action by local units of government in situations where the states

do nothing more than abstractly authorize local governments to cooperate. More specifically, the Court of Appeals' holding will allow local units of government to combine their power to block any development or to favor only particular developers. Competition in the market for development will be supplanted by arbitrary governmental control over residential and commercial development. Whether or not that is desirable economic or social policy is a matter, of course, for elected state legislatures to decide. Yet a review of the statutes relied upon below indicates that here that issue was decided by the Court of Appeals and not by the elected representatives of Illinois.

For these reasons, plaintiffs ask the Court to grant the writ of certiorari and to reverse the decision below.

DATED: April 14, 1986

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

LaSalle National Bank of Chicago, et al.,

Plaintiffs,

No. 82 C 6517 v.

The County of DuPage, et al.,

Defendants.

Honorable Paul E. Plunkett

MEMORANDUM OPINION AND ORDER

This is an antitrust suit against three local governmental units: DuPage County, Illinois (the "County") and the Villages of Lisle ("Lisle") and Woodridge ("Woodridge") (collectively "Defendants"), situated in the County. The Defendants argue that they are immune from liability for antitrust violations under the principle of sovereign immunity.

Based primarily on this argument, Defendants move the Court to dismiss the complaint against them.[1] For the purpose of ruling on this motion, the Court will consider the facts alleged by the complaint as true. *Stern v. United States Gypsum, Inc.*, 547 F.2d 1329, 1332 (7th Cir.), *cert. denied*, 434 U.S. 975 (1979). These facts are as follows.

Near the western boundary of Lisle and the County lies an unincorporated parcel of land known as the Greene Area. Although the Greene Area is in near proximity to the City of Chicago it has a low population density. Because Greene Area is close to the City, it is served by an existing network of roads and public transportation facilities.[2]

These features made Greene Area a promising piece of real estate for residential developers during the late nineteen sixties. In 1969, Plaintiffs purchased Greene Area for the purpose of developing Hobson Greene, a luxury residential and commercial community. Their proposed plan for Hobson Greene included approximately 268 single family homes, 713 multiple family dwellings, a retail commercial center, large open recreation spaces and equestrian trails leading into the DuPage County Preserve.[3]

Plaintiffs' plans for Hobson Greene never reached fruition because Defendants allegedly denied Plaintiffs special zoning permits, water services, and sewage treatment facilities. Without these, Hobson Greene could not be developed.

Plaintiffs allege that Defendants' action in denying them zoning permits and utility services was designed to increase their unlawful control over the luxury residential development market in the County.[4]

During the nineteen sixties, developers competed with each other throughout the greater Chicago area to attract buyers who were seeking luxurious residential property. The cost of developing such real estate could be minimized if a developer obtained utility services at a cost efficient rate from a nearby municipality in exchange for executing an annexation agreement with it. Under this kind of arrangement, the municipality could annex an area with a lucrative tax base and the developer gained a competitive edge over developers of other luxury residential projects. A byproduct of such arrangements, however, was that municipalities began competing with each other to secure annexation agreements with luxury residential developers.

Given this competitive environment, developers could effectively bargain with neighboring municipalities for favorable utility packages by threatening to either sign annexation agreements with other communities or allow their real estate to remain an unincorporated parcel of land within the local county.[5]

According to Plaintiffs, Defendants realized that they were in a poor bargaining position with the developers of the County. They perceived that they could improve their situation by acting in concert with other municipalities to control the luxury development market rather than by competing with each other. To further this objective, they took three actions which impacted negatively upon the proposed development of Hobson Greene. First, in 1974, Defendants conspired to deny Plaintiffs a special use permit which was necessary for the development of Hobson Greene. Plaintiffs point out that a virtually identical application was granted for a proposed luxury development north of Hobson Greene at the same time. Furthermore, the Illinois Appellate Court held that Defendants improperly violated the due process clause by denying Plaintiffs' application.[6] Second, during 1978, Defendants Lisle and Woodridge entered into several boundary agreements.[7] Under these contracts each village received the exclusive right to annex new developments and to provide utility service to new developments in a particular region of the County. By the same agreements, no municipality could provide water service to any property outside its territory. Plaintiffs requested water service for Hobson Greene but were refused such service unless they agreed to execute an annexation agreement with Woodridge. Plaintiffs subsequently requested water service from Lisle. But, Lisle refused their request saying that Hobson Greene was outside of its territory as defined by the boundary agreements.[8]

Third, Defendants entered into agreements apportioning the sewage treatment services in central DuPage County. The agreement between Woodridge and DuPage County provided that Woodridge would have complete

discretion to extend sewer service beyond its limits. If Woodridge refused to provide sewage treatment to a particular area the County would provide it under this agreement. The agreement also stipulated that if the available sewage treatment plant capacity had to be allocated or reserved, Woodridge would have the right of first refusal as to a stated number of connections per year (minimum 1,000 connections per year for the first five years and 650 per year thereafter). Plaintiffs allege that the agreement between the County and Lisle contained similar terms concerning the possible allocation of available treatment facilities.[9]

On August 13, 1980 Defendants agreed to allocate the available sewage treatment capacity among themselves. This agreement transpired because the Illinois Environmental Protection Agency[10] (the "I.E.P.A.") determined that the sewage treatment facilities in the County were overburdened. It was therefore necessary to put them on "restricted status," i.e., no new connections to the facilities would be allowed until the capacity of the facilities was increased. Discussions between Defendants and the I.E.P.A.[11] resulted in an agreement whereby the I.E.P.A. allowed a limited number of new connections, provided Defendants ungraded the sewage facilities.

Defendants subsequently agreed to allocate these new connections solely among themselves. Plaintiffs allegedly did not receive either notice or an opportunity to be heard in this allocation process. Plaintiffs allege that Defendants allocated the available connections in an arbitrary and capricious manner to further their conspiracy to exercise control over the luxury development market.

In summary, Plaintiffs allege that Defendants misused their statutory zoning, sewage and water treatment powers to thwart the development of Hobson Greene, thereby furthering their conspiracy to control the luxury development market throughout the County. Accordingly, Plaintiffs seek damages from Defendants under the Sherman Antitrust Act, 15 U.S.C. §1 *et seq.*

Defendants argue that the complaint must be dismissed because they are local governmental bodies who denied Plaintiffs a zoning use permit, sewage treatment access and water services pursuant to statutory authorization and that thus they are immune from liability for their actions under the Sherman Act. To assist the Court in analyzing this argument, it will summarize the pertinent case law on the sovereign immunity of local governmental entities from antitrust liability.

In construing the federal antitrust statutes, the Supreme Court has recognized that states sometimes need to authorize certain anticompetitive activities by their subdivisions or municipalities. When they do so affirmatively, in a clearly articulated manner, they immunize their subdivisions or municipalities against liability for federal antitrust violations. *Community Communications Co. v. City of Boulder*, 455 U.S. 40 (1982).

This recognition is based upon the principle that state governments will not function effectively unless they can delegate certain anticompetitive powers to their political subdivisions or municipalities without undue federal interference. Similarly, if political subdivisions or municipalities cannot legitimately exercise the powers with which they have been entrusted by states such delegations of authority are meaningless. Political subdivisions and municipalities would be reluctant to legitimately exercise their delegated authority if they were threatened with potential liability under the federal antitrust laws for legitimately doing so.

Although the federal courts must safeguard the legitimate exercise of state delegated authority by subdivisions and municipalities, they are also obliged to enforce the antitrust laws which Congress has enacted. In view of the serious economic dislocation which would result if subdivisions and municipalities were free to use their anticompetitive powers without limitation, the Supreme Court has balanced these two interests by strictly limiting the immunity of political subdivisions and municipalities from federal antitrust laws.

Accordingly, sovereign immunity is available only for conduct which a subdivision or municipality engages in pursuant to a clearly articulated state policy which seeks to displace competition with regulation or monopoly public service, 455 U.S. 40, *supra*. If a subdivision or municipality falls within the cloak of sovereign immunity it is protected only insofar as it uses its monopolistic power in the manner which the state contemplated when it specifically authorized the action, *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389-390 (1978).

For example, *Community Communications Co. v. City of Boulder*, 455 U.S. 40 (1982), addressed the issue of whether a general home rule provision in the Colorado Constitution immunized Boulder from antitrust liability for passing a moratorium against cable television expansion. The home rule amendment affirmatively granted Colorado municipalities all of the powers in local matters which had previously been exercised by the state legislature. However, the Supreme Court held that this general grant of power did not clearly articulate or affirmatively express a state policy to restrict competition in the cable television market. In other words, the home rule provision was not specific enough to immunize Boulder from antitrust liability for creating a monopoly in the cable television market.

The Seventh Circuit recently analyzed the degree of specificity which a state articulated policy must meet to confer antitrust immunity upon a municipality, *Town of Hallie v. City of Eau Claire*, No. 82 C. 1715 (7th Cir. Feb. 17, 1983). In *Hallie*, four towns alleged that a nearby city violated antitrust laws to monopolize the local sewage collection and transportation markets. The city allegedly established this monopoly by refusing to supply any sewage treatment services for the towns. It also conditioned sewage treatment service for individual property owners in the towns upon their consent to be annexed by the city and to obtain sewage collection as well as sewage transportation services from it.

The city moved to dismiss these allegations arguing that it was immune from antitrust liability. The towns dis-

agreed, contending that the city could successfully claim immunity only if it could pinpoint a clearly articulated state policy which specifically authorized it to use its sewage treatment monopoly for monopolizing sewage collection and transportation. The Seventh Circuit rejected the town's argument. It held that the city could successfully assert the immunity defense because the court could find that the legislature contemplated the kind of action about which the towns complained.

The court based this finding upon its review of Wis. Stat. §§66.069(2)(c) and 144.07(lm) and Wisconsin case law interpreting these statutes. The former authorized cities to delineate the area for which they would provide sewage services. It explicitly relieved cities of any obligations to extend service beyond this area. Section 144.07(lm) allowed the state to order cities to provide sewage service for a town, but provided that such an order would become void if the town subsequently refused to be annexed by the city. The Wisconsin Supreme Court interpreted these statutes to mean that the legislature viewed annexation as a reasonable quid pro quo which cities could demand before extending sewage service to a town, *Town of Hallie v. City of Chippewa Falls*, 105 Wis.2d 533, 314 N.W.2d 321 (1982). The Seventh Circuit viewed the statutes and cases construing them as an indication that the Wisconsin legislature adopted a policy of not burdening cities with providing sewage service to territory they could not annex. The court further found that the city acted pursuant to and in a manner consistent[12] with this policy by not providing the towns with sewage treatment unless they became annexed to the city and acquired the full range of sewage services. Consequently, the court held that the city's action in refusing sewage collection and transportation was in furtherance of clearly articulated and affirmatively expressed state policy and thus did not violate antitrust law.

In this case, we must consider whether, under *Boulder* and *Hallie*, the state of Illinois affirmatively and specifically authorized Defendants to take the allegedly anticompetitive actions about which Plaintiffs complain. These

alleged actions are not simply denying Plaintiffs a zoning permit, water service and sewage treatment facilities, but that Defendants cooperatively used these and other means for over ten years to enhance their own bargaining position, vis-a-vis luxury real estate developers. Accordingly, an affirmative state authorization which would be specific enough to immunize Defendants must reflect that the state contemplates this type of cooperative action.

Defendants contend that their allegedly cooperative action was authorized by the Illinois Constitution of 1970, Art. 7, §10[a] and Ill.Rev.Stat. ch. 24, §1-1-5. The former provides that: "[u]nits of local government may contract or otherwise associate among themselves . . . and with the United States to obtain or share services and to exercise, combine or transfer any power or function, in any manner not prohibited by law. . . ." Illinois Revised Statutes ch. 24, §1-1-5 states that: "[t]he corporate authorities of each municipality may exercise jointly, with one or more other municipal corporations or governmental subdivisions or districts, all of the powers set forth in this Code unless explicitly provided otherwise."

While these provisions authorize municipalities to cooperate in exercising their constitutional and statutory powers, they do not clearly and affirmatively authorize them to jointly engage in the anticompetitive conduct which Plaintiffs complain about here. In this regard, they are like the home rule provision in *Boulder* which gave the municipality the power to pass the cable television ordinance but did not authorize it to pursue the anticompetitive conduct that Plaintiffs complained about in their antitrust suit.[13] By comparison, the Wisconsin statutes and case law involved in *Hallie* specifically authorized the anticompetitive actions which Defendants allegedly took. Accordingly, Defendants' motion to dismiss is hereby denied.

ENTER:

/s/ Paul E. Plunkett
District Court Judge

Dated: January 16, 1984

FOOTNOTES

[1] Defendants also argue that the complaint should be dismissed because: (1) Plaintiffs have not sufficiently alleged an antitrust injury, or (2) alleged that the antitrust violation which they complain about has a substantial impact on interstate commerce. Defendants' first argument must fail under *Brunswick Corp. v. Pueblo Bowl-O-Matic, Inc.*, 429 U.S. 477, 489 (1976) because Plaintiffs have alleged that Defendants' actions impaired competition between municipalities to annex luxury developments and restricted competition between developers to develop their land at a reduced cost. Defendants' second argument must also fail. Plaintiffs alleged that Defendants' conspiracy effectively dissuaded luxury developers from developing areas located in the County. They also allege that such development would have utilized interstate financial markets, supplies and materials shipped through interstate commerce. These allegations are sufficient to establish jurisdiction under the Sherman Act. *McLain v. Estate Board of New Orleans*, 446 U.S. 232 (1980). The fact that *McLain* was a class action suit does not change this result. *McLain* at 243.

Finally, Defendants contend that the Tenth Amendment to the United States Constitution protects them from antitrust liability. However, they have not shown that an alleged conspiracy to restrict competition among developers, *infra*, pp. 2-5, is the type of activity traditionally carried on by local governments which the Tenth Amendment protects under *National League of Cities v. Usery*, 426 U.S. 833, 845 (1976).

[2] Complaint, ¶¶13-14.

[3] Complaint, ¶¶14-16.

[4] Complaint, ¶¶15-19, 44.

[5] Complaint, ¶¶20, 23, 24.

[6] Defendants claim that the zoning conduct was immunized since the Illinois legislature authorized the County to promulgate zoning regulations for unincorporated areas of the County under Ill.Rev.Stat. ch. 34, §§3151-3157. Specifically, Ill.Rev.Stat. ch. 34, §3151 provides:

> For the purpose of promoting the public health, safety, morals, comfort and general welfare, conserving the values of property throughout the county, lessening or avoiding congestion in the public streets and highways, and lessening or avoiding the hazards to persons and damage to property resulting from the accumulation or runoff of storm or flood waters, the board of supervisors or board of county commissioners, as the case may be, of each county, shall have the power to regulate and re-

strict the location and use of buildings, structures and land for trade, industry, residence and other uses which may be specified by such board, to regulate and restrict the intensity of such uses, to establish building or setback lines on or along any street, trafficway, drive, parkway or storm or floodwater runoff channel or basin outside the limits of cities, villages and unincorporated towns which have in effect municipal zoning ordinances. . . .

Nothing in this Act shall be construed to restrict the powers granted by statute to cities, villages and incorporated towns as to territory contiguous to but outside of the limits of such cities, towns, villages and incorporated towns.

[7] As authority for such boundary agreements Defendants point to Ill.Rev.Stat. ch. 24, §11-12-9:

If unincorporated territory is within one and one-half miles of the boundaries of two or more corporate authorities that have adopted official plans, the corporate authorities involved may agree upon a line which shall mark the boundaries of the jurisdiction of each of the corporate authorities who have adopted such agreement. . . .

In the absence of such agreement, the jurisdiction of any one of the corporate authorities shall extend to a median line equidistant from its boundary and the boundary of the other corporate authority nearest to the boundary of the first corporate authority at any given point on the line.

[8] Specifically, the Illinois Constitution, Article VII, §10(a) authorizes units of local government ". . . to contract or associate among themselves . . . to obtain or share services and the exercise, combine, or transfer any power or function, in any manner not prohibited by law or by ordinance. . . ." Ill.Rev.Stat. ch. 24, §11-12-9 provides that "[i]f unincorporated territory is within one and one-half miles of the boundaries of two or more corporate authorities that have adopted official plans, the corporate authorities involved may agree upon a line which shall mark the boundaries of the jurisdiction of each of the corporate authorities who have adopted such agreement." Municipalities are given the discretionary authority to extend sewer and water services under Ill.Rev.Stat. ch. 24, §11-149-1. *Amalgamated Trust & Savings Bank v. Village of Glenview*, 98 Ill.App.3d 254, 423 N.E.2d 1230 (1st Dist. 1981) on the point of the municipality's authority to require annexation before water service is provided held that a "[m]unicipality is under no obligation to supply nonresidents with water in absence of contractual undertaking" (423 N.E.2d 1230) and that "[V]illage, by ordinance requiring annexation and conformance to its land use plans as prerequisite to nonresidents' receiving water service, did

not establish a monopoly in violation of the Antitrust Act." 423 N.E.2d 1230, 1231.

[9] Defendants claim the agreements Defendants entered into were immunized from the reach of the federal antitrust laws since the State of Illinois expressly authorized Defendants to enter into these agreements through a number of statutory and constitutional provisions.

Ill.Rev.Stat. ch. 34, §3111 authorizes a county ". . . to control and regulate the disposal of sewage . . . to construct or purchase and operate a water works system or a sewerage system . . . to furnish water or sewerage service or combined water and sewerage service to individuals, municipal corporations and may impose and collect charges or rates for furnishing water or sewerage service or combined water and sewerage service . . ." and ". . . to enter into and perform contracts, whether long-term or short-term, with any municipal, public utility or other corporation, or any person or firm, for the furnishing by the county of water or sewerage service or combined water and sewerage service."

Ill.Rev.Stat. ch. 24, §11-147-4 authorizes municipalities lying within certain counties to ". . . contract with such county for water supply or sewerage service to or for the benefit of the inhabitants of the municipality."

Ill.Rev.Stat. ch, 24, §11-146-1 provides that "[t]he corporate authorities of each municipality may contract with the State of Illinois, any municipality, or any person for the collection and disposal of sewage originating outside of municipalities. The corporate authorities of a municipality may provide by ordinance for the extension and maintenance of municipal sewers in specified areas outside the corporate limits."

Under Ill.Rev.Stat. ch. 24, §11-149-1 "[t]he corporate authorities of a municipality may provide by ordinance for the extension and maintenance of municipal sewers and water mains, or both, in specified areas outside the corporate limits."

[10] The I.E.P.A. is an agency of the executive branch of state government. Ill.Rev.Stat. ch. 111½, §1004(a). The I.E.P.A. is given full responsibility to administer the National Pollution Discharge Elimination System established under the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. §1251 *et seq.* *See* Ill.Rev.Stat. ch. 111½, §§1004(g), 1011(a)(2).

[11] The I.E.P.A. is authorized "to engage in planning processes and activities and to develop plans in cooperation with units of local government, state agencies and officers, and other appropriate persons in connection with the jurisdiction or duties of each such unit, agency, officer or person." Ill.Rev.Stat. ch. 111½, §1004(n).

[12] In a similar case, the Eighth Circuit found that a municipality was authorized to contract in an anticompetitive manner with local ambulance companies for service within the city limits. *Gold Cross Ambulance and Transfer v. City of Kansas City*, 705 F.2d 1005 (8th Cir. 1983). The ambulance companies in Kansas City challenged a city policy under which a municipal trust contracted with a single ambulance company to provide all the services within the city. However, the court found that the city was immune from antitrust liability for this policy because a Missouri statute authorized cities to contract with one or more ambulance operators. The court held that this statute contemplated that cities could also contract with just one in an anticompetitive manner under the language "with one or more." By comparison, the Ninth Circuit denied a motion to dismiss under the same principles in *Parks v. Watson*, 716 F.2d 646 (9th Cir. 1983). In that case, the city denied a developer's application to vacate specific platted city streets unless it agreed to dedicate certain land containing geothermal units. The developers sued alleging antitrust violations. The Ninth Circuit denied the motion to dismiss because it found that a state statute authorizing public ownership of geothermal resources did not expressly authorize the city to act anticompetitively to achieve such ownership.

[13] Judge Grady has provided an excellent summary of recent opinions applying *Boulder* and *Hallie* in cases much like this one. While this Court finds it unnecessary to repeat Judge Grady's discussion here, it does agree with his reasoning as expressed therein. *Vickery Manor Service Corp., et al. v. Village of Mundelein*, No. 82 C 5392 at 13-18 (N.D. Ill. Nov. 28, 1983).

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Name of Presiding Judge,
Honorable Paul E. Plunkett

Cause No. 82C6517 Date Aug. 3, 1984

Title of Cause—LaSalle National Bank v. County of DuPage

Brief Statement of Motion—Motion to Reconsider or In the Alternative Certify for Interlocutory Appeal

* * * * *

Upon reconsideration, this Court readopts its Memorandum Opinion and Order of January 16, 1984. The Court finds that the issues addressed therein involve controlling issues of law as to which there are substantial grounds for differences of opinion and immediate appeal would advance the ultimate termination of this litigation under 28 U.S.C. § 1292(b). The instant case shall be stayed in this Court pending a ruling by the Court of Appeals as provided by 28 U.S.C. § 1292(b).

/s/ Plunkett, J.

APPENDIX B

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 84-2684

LaSalle National Bank of Chicago, et al.,

Plaintiffs-Appellees,

v.

The County of DuPage, et al.,

Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 82 C 6517—**Paul E. Plunkett**, *Judge.*

Argued June 14, 1985—Decided November 18, 1985

Before Wood, *Circuit Judge*, Fairchild, *Senior Circuit Judge*, and Grant, *Senior District Judge.**

Wood, *Circuit Judge.* On this appeal we must decide whether alleged anticompetitive activities of three local governmental units constitute state action and are therefore exempt from federal antitrust law under *Parker v. Brown*, 317 U.S. 341 (1943) and its progeny.

Plaintiffs, owners and developers of a 145-acre parcel of land in DuPage County, Illinois, sued the County of

* The Honorable Robert A. Grant, Senior District Judge of the Northern District of Indiana, is sitting by designation.

DuPage, its Board of Commissioners, and two municipalities located within the County—the Villages of Woodridge and Lisle—alleging that these three local governmental units conspired through a series of acts spanning a nine-year period to restrain competition among themselves for development projects in DuPage County and to restrain competition among the developers. The defendants moved to dismiss the complaint arguing *inter alia* that their allegedly violative conduct constituted "state action" and was therefore exempt from Sherman Act challenge under the "state action doctrine" of *Parker v. Brown*, 317 U.S. 341 (1943).[1] The district court denied the motion, holding that the localities' conduct did not constitute state action. The district court later certified its decision and this court granted defendants leave to take an interlocutory appeal. *See* 28 U.S.C. § 1292(b). On review we hold that the local governments' alleged violative conduct, although a close question, constitutes "state action" and is therefore exempt. Accordingly we reverse the district court order and grant the motion to dismiss.

I.

The well-pleaded facts in the complaint, accepted as true at this motion to dismiss stage, *Stern v. United States Gypsum, Inc.*, 547 F.2d 1329, 1332 (7th Cir.), *cert. denied*, 434 U.S. 975 (1977) are as follows.

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[1] Defendants also argued that the complaint should be dismissed because (1) it does not sufficiently allege an antitrust injury, (2) it does not allege that the antitrust violation has a substantial impact on interstate commerce, and (3) it concerns local government activity that the tenth amendment prohibits the federal government from regulating. The district court rejected all of these additional grounds for dismissal. In view of our finding that the complaint should be dismissed on "state action" grounds we do not address these arguments.

In 1969 plaintiffs[2] ("Developer") purchased a 145-acre parcel of unincorporated land in DuPage County near Chicago with the intention of developing the area for luxury-type housing and related commercial businesses. The 145-acre development is known as "Hobson Greene" and lies within a largely unincorporated 1,500-acre area known as the "Greene Area." Defendant DuPage County ("County"), through defendant Board of Commissioners, governs the unincorporated portions of DuPage County including the area containing Hobson Greene. The other defendants, the Villages of Lisle and Woodridge, are located within DuPage County on the eastern boundary of the Greene Area.

Developer's complaint charges that through a series of acts spanning a nine-year period (1971 to 1980) the defendants conspired to unlawfully restrain competition among developers in DuPage County and the Chicago metropolitan area and competition among local governmental units who seek to annex, to tax, to zone, and to provide utility services to developments. The complaint breaks the conspiracy down into three components, one involving zoning, another sewage, and the third water and annexation.

Sewage: In or about 1971 the County and the Villages decided to consolidate the ownership and management of their various sewage treatment facilities. To this end the County purchased the sewage treatment facilities of each of the Villages and agreed to provide sewage treatment service to the Villages. Among the provisions in the sales agreements was one reserving for each Village the right to determine which users outside the Village would receive sewage treatment service from the sewage treatment plant the Village was selling to the County. The

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[2] The plaintiffs include Unity Ventures, an Illinois partnership engaged in real estate development; William Alter, Unity Venture's managing partner and the beneficial owner (through land trusts) of the 145-acre parcel at issue; and LaSalle National Bank of Chicago, trustee of the land trusts comprising the 145 acres.

agreements also specified that in the event new sewage treatment connections had to be rationed the Villages would each have a right of first refusal to a certain number of connections.

The contingency contemplated in the sales agreements occurred in 1979 when the Illinois Environmental Protection Agency ("IEPA") determined that the consolidated DuPage County sewage treatment was overburdened. The IEPA sought to place a freeze on all further connections to the sewage treatment system until capacity was increased. After negotiations the IEPA agreed to allow a limited number of new connections if the County would take certain steps to upgrade its treatment facility. The County and Villages then agreed on a formula for dividing additional connections among themselves. The agreement, apparently in compliance with the 1971 sales agreements' reservation of rights clauses, allocated the new connections according to the following percentages: 38% to the Village of Lisle, 34% to the Village of Woodridge, 28% to unincorporated portions of DuPage County. The agreement was subsequently embodied in a state circuit court decree, *Corporate West Development, Inc. v. Illinois Environmental Protection Agency*, No. 79 MR 257 (Cir. Ct. DuPage Cnty, August 13, 1980) (Supp. App. Rec.). The Developer was not given notice or an opportunity to be heard prior to entry of the decree even though it had preexisting valid permits for sewage service. The 28% given to the County for unincorporated areas was not sufficient to meet the needs of the Hobson Greene development. Developer petitioned the state circuit court to reconsider and grant Developer leave to intervene. The court granted Developer leave to intervene and is presently reconsidering its decree in view of Developer's due process challenge.

Zoning: The second component of the conspiracy involves the County's denial of Developer's petition for a special use permit for Hobson Greene. In 1970 Developer petitioned the DuPage County Zoning Board of Appeals for a special use permit that would have allowed it to pro-

ceed with the proposed luxury housing development. After conducting a public hearing the Zoning Board of Appeals recommended that the County's Board of Commissioners deny the petition for the special use permit. On December 24, 1974 the defendant DuPage County Board of Commissioners adopted the Zoning Board's recommendation to deny the petition. Developer appealed the denial and an Illinois appeals court ultimately reversed the Board's decision and found the Board's action has "little or no relation to the public health, safety and welfare of DuPage County." *See LaSalle National Bank v. County of DuPage*, 54 Ill. App. 3d 387, 396, 369 N.E.2d 505, 512, 12 Ill. Dec. 8, 15 (2d Dist. 1977). Although the Developer's complaint does not state whether or in what way the Villages were involved in the County's decision to deny the permit, the Developer's brief asserts that the Villages "opposed" the permit. We presume that the Villages communicated this opposition to the County.[3]

Boundary Agreement (Water and Annexation): The third component of the conspiracy is a 1978 agreement between the Villages to divide the unincorporated land lying between their borders for purposes of annexation and the provision of water service. In 1978 Developer approached the Village of Woodridge about providing water service to the Hobson Greene development. Woodridge conditioned the provision of water service on Developer's acceptance of Woodridge's annexation of the Hobson Greene development. Developer, apparently not satisifed with the terms of Woodridge's offer, approached the Village of Lisle about water service. Since Hobson Greene lies without Lisle's exclusive territory Lisle refused to deal with Developer.

[3] Although this failure to allege any involvement by the Villages may in itself justify dismissal of this portion of the complaint since without such involvement there was no joint action to ground a conspiracy, we need not decide this issue because of our decision to dismiss on state action grounds.

II.

We must decide whether any of these alleged agreements among the three local governmental units constitutes "state action" as that term is used in *Parker v. Brown*, 317 U.S. 341 (1943) and its progeny. The Supreme Court in *Parker*, relying on policies of federalism and state sovereignty, narrowly construed the Sherman Act to exempt a state, acting through its legislature, from antitrust liability arising from anticompetitive conduct. 317 U.S. at 350-52. Several decades later, in a series of decisions, the Supreme Court considered the state action doctrine as it applies to conduct of local governmental units. *See City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978); *Community Communications Co. v. City of Boulder*, 455 U.S. 40 (1982); *Town of Hallie v. City of Eau Claire*, 105 S. Ct. 1713 (1985). The Court held that local governmental conduct is not necessarily exempt from federal antitrust laws since local governments, unlike states, are not sovereigns; rather local governmental conduct is exempt when taken pursuant to a clearly articulated state policy to displace competition with regulation or monopoly public service. *Id.* at 1716-17.

Although the cases have not clearly defined the parameters of this "clear articulation" test, they have provided some guidance. It is not sufficient that a state merely have granted local governments general authority to govern local affairs, *see City of Boulder*, 455 U.S. 40 (1982) (holding state's home-rule law not to constitute "clear articulation" of state policy to displace competition is cable television market). On the other hand, the state need not specifically authorize conduct with anticompetitive effects. *Town of Hallie*, 105 S. Ct. at 1718. It is sufficient that anticompetitive effects are a foreseeable consequence of engaging in the authorized activity. *Id.* at 1718-19. In considering the three alleged conspiratorial acts we will first determine whether any state legislative act(s) authorizes the challenged conduct and then determine whether anticompetitive effects are a foreseeable result of the authorization. An affirmative determination to both questions

will lead us to conclude that the state intended the localities' challenged conduct to be exempt from federal antitrust laws.

III.

Sewage: The complaint alleges that the County and the Villages violated antitrust laws by agreeing to a formula for allocating new sewage connections among themselves in response to IEPA charges that the consolidated County treatment plants were processing too much waste. The formula agreed upon was apparently first contained in the two agreements (one between Woodridge and County, the other between Lisle and County) which effected the consolidation of the ownership and management of all sewage treatment facilities in the County. As part of the consideration for turning over ownership of their own treatment plants to the County, the Villages each reserved the right to a certain number of new connections in the event sewage treatment supply in the County became scarce. As it turned out a shortage did result when the IEPA forced the County to add new capacity and limit the number of new connections.

The State of Illinois authorizes counties and municipalities to contract together and combine resources for the provision of sewage treatment. Ill. Ann. Stat. ch. 34, ¶ 3111 (Smith-Hurd 1985 pocket part) (counties "may furnish . . . sewerage service . . . to municipal corporations . . . [and] may enter into and perform contracts . . . with any municipal[ity], . . . for the furnishing . . . of . . . sewerage service"); Ill. Ann. Stat. ch. 24, ¶ 11-147-4 (Smith-Hurd 1962) ("Any municipality lying wholly or partly within the boundaries of any county which accepts the provisions of 'An Act in relation to water supply, drainage, sewage, pollution and flood control in certain counties,' [Ill. Ann. Stat. ch. 34, ¶ 3101-3123] may contract with such county for water supply or sewerage service to or for the benefit of the inhabitants of the municipality"); Ill. Ann. Stat. ch. 111½, ¶ 1046(b) (Smith-Hurd 1977) ("in order to be eligible for federal grants for construction of

sewage works pursuant to Section 201(g) of the Federal Water Pollution Control Act Amendment of 1972 (P.L. 92-500), any municipality, county, special district or other unit of local government . . . that owns or operates sewage works may adopt . . . ordinances or regulations to provide for systems of proportionate cost sharing for operation and maintenance by recipients of such unit's waste treatment services.").[4] The legislature has also expressly authorized the IEPA "to engage in planning processes and activities and to develop plans in cooperation with units of local government . . . in connection with the jurisdiction or duties of each such unit . . . ." Ill. Ann. Stat. ch. 111½, ¶ 1004(n) (Smith-Hurd 1977).

We think that together the statutes permitting cooperation between local governmental units for the provision of sewage treatment and the statute authorizing local units to cooperate with the IEPA in reducing water pollution constitute authorization for the allocative agreement entered into by defendants. We also see anticompetitive results are a foreseeable consequence of this authorization. It is commonly recognized that one of the chief obstacles to pollution control is the competition among governmental units, whether local, state, or national, for commercial and residential development. Such competition leads governments to relax pollution control standards resulting in environmental deterioration not only in the area where standards are relaxed but in nearby jurisdictions as well. A United States Senate Report on the Federal Water Pollution Control Act Amendments of 1972 speaks of this tension between intergovernmental competition for economic development and pollution control objectives:

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[4] Although paragraph 1046(b)'s syntax leaves something to be desired (the "in order to" phrase in the first clause suggests that the second clause will set forth a conditional requirement for obtaining federal grants, where in fact the second phrase uses the permissive verb "may"), we think it means that a municipality has authority to adopt proportionate cost sharing *if* they do so for the purposes of being (*i.e.*, "in order to" be) eligible for federal grants.

> The independent functioning of units of government in areas of population concentration without regard to the pollution related requirements of other areas of the same region will not be possible. Uncontrolled growth and expansion and competition among units of government will be reduced if effective environmental controls are to be imposed.

Sen. Rep. No. 414, 92d Cong., 2d Sess., *reprinted in* 1972 U.S. Code Cong. & Ad. News 3668, 3704. We think it clear that the Illinois statutory scheme which encourages local units of government to cooperate among themselves and with the IEPA in the provision of sewage treatment evinces legislative appreciation of the tension between intergovernmental competition for economic development and pollution control goals, and implicitly sanctions reduced intergovernmental competition.

In sum, free competition and competitive pricing are not the policies underlying the Illinois scheme for sewage treatment. Rather the scheme is one in which local governmental units are encouraged to cooperate in providing sewage service to residences within their boundaries for the common good of the communities they serve. These local and regional decisions regarding sewage treatment are guided by political forces, minimal judicial review, *see Krol v. County of Will*, 38 Ill. 2d 587, 590 (1968), and state and national environmental protection laws. Under such a scheme anticompetitive effects are clearly foreseeable and contemplated. We therefore hold that the defendants' agreement allocating sewage treatment capacity was authorized and that the Illinois legislature intended that such cooperative agreements not be the subject of federal antitrust suits.

Zoning: Developer alleges that the three local governmental units conspired to deny it a special use permit without which the Hobson Greene luxury-housing development could not proceed. Although Developer's complaint does not specify the nature of the two Villages' involvement in the County's decision to deny the petition for a special zoning permit, Developer's brief suggests that the

two Villages somehow combined efforts to persuade the County to deny the special permit.

The Illinois state legislature has specifically granted counties the power to regulate zoning in unincorporated areas. Ill. Ann. Stat. ch. 34, ¶ 3151 (Smith-Hurd 1985 pocket part).[5] The legislature has also expressly authorized counties "to *cooperate* . . . with cities, villages or other municipal corporations either within or without such county" in all matters relating to zoning. Ill. Ann. Stat. ch. 34, ¶ 3159 (emphasis added) (Smith-Hurd 1960). We think that these statutes constitute State of Illinois authorization for consultation between the County and Villages regarding the Developer's special use permit petition.

We also hold that anticompetitive effects are a foreseeable result of this authorization. By definition zoning is an approach to land use which engrafts upon laissez-faire capitalism a regulatory scheme controlled by political institutions. As one commentator put it, the "grant of zoning power necessarily reflects a state determination that regulation should displace market competition otherwise

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[5] This power includes the power

> to regulate and restrict the location and use of buildings, structures and land for trade, industry, residence and other uses which may be specified by [the board of supervisors], to regulate and restrict the intensity of such uses, to establish building or setback lines on or along any street, trafficway, drive, parkway or storm or floodwater runoff channel or basin outside the limits of cities, villages and incorporated towns which have in effect municipal zoning ordinances; to divide the entire county outside the limits of such cities, villages and incorporated towns into districts of such number, shape, area and of such different classes, according to the use of land and buildings, the intensity of such use (including height of buildings and structures and surrounding open space) and other classification as may be deemed best suited to carry out the purposes of this Act; to prohibit uses, buildings or structures incompatible with the character of such districts respectively . . . .

Ill. Ann. Stat. ch. 34, ¶ 3151 (Smith-Hurd 1985 pocket part).

protected by antitrust laws." Areeda, ANTITRUST LAWS p. 69, ¶ 212.7d (1982 Supp.); *accord Racetrac Petroleum, Inc. v. Prince George's County*, 601 F. Supp. 892, 906 (D. Md. 1985) (holding Maryland zoning act to constitute a clearly articulated and affirmatively expressed state policy to displace free competition among landowners and users of land with regulation).

That the legislature foresaw anticompetitive effects and intended that the federal antitrust laws not apply to local zoning decisions is also evidenced by the purposes it delineated for zoning:

> [the promotion of] public health, safety, morals, comfort and general welfare, conserving the values of property throughout the country, lessening or avoiding congesting in the public streets and highways, and lessening or avoiding the hazards to persons and damage to property resulting from the accumulation or runoff of storm or flood waters . . . .

Ill. Ann. Stat. ch. 34, ¶ 3151 (Smith-Hurd 1985 pocket part). These purposes, although not necessarily in conflict with the policies of the antitrust laws, are not necessarily consistent with them either, and to that extent the legislature can be said to have foreseen anticompetitive effects.

Developer argues that the Illinois legislature has not met the clear articulation test because it did not authorize the intergovernmental cooperative effort to deny Developer the special permit *for anticompetitive purposes*, rather it authorized such conduct for the purposes delineated in the state zoning statute quoted above, Ill. Ann. Stat. ch. 34, ¶ 3151 (Smith-Hurd 1985 pocket part). Developer would require that the legislature expressly authorize both the objective conduct and the subjective anticompetitive purpose. Developer's argument does not accord with *Town of Hallie*, 105 S. Ct 1713. *Town of Hallie* does not require that the legislature expressly authorize conduct with a subjective anticompetitive purpose. Rather, it is only necessary that the legislature authorize the ob-

jective conduct (here cooperative zoning decisions) that foreseeably results in the anticompetitive effect. 105 S. Ct. at 1718 (holding that "[i]t is not necessary . . . for the state legislature to have stated explicitly that it expected the [defendants] to engage in conduct that would have anticompetitive effects," it is sufficient that the anticompetitive conduct is a foreseeable result of the authorization); *accord Town of Hallie*, 700 F.2d 376 (7th Cir. 1982), *aff'd*, 105 S. Ct. 1713 (1985). True, the Illinois legislature has not expressly authorized zoning for the purpose of restraining competition, but it has authorized cooperative zoning for purposes which will at times foreseeably come into conflict with free competition; the authorization was therefore specific enough to pass the clear articulation test.

Developer also argues that the local governments' cooperative efforts to deny the special permit were not authorized because a state appeals court has overturned the County's denial of the special permit, holding that the decision had no relation to the public health, safety, and welfare of DuPage County or any other purpose for which zoning is authorized under Ill. Ann. Stat. ch. 34, ¶ 3151 (Smith-Hurd 1985 pocket part). *See LaSalle National Bank v. County of DuPage*, 54 Ill. App. 3d 387, 369 N.E.2d 505, 12 Ill. Dec. 8 (2d Dist. 1977). The question litigated in the state court—whether the County of DuPage correctly decided whether to grant the zoning petition—is quite different from the issue litigated here—whether the three governmental units had the authority to cooperate in making zoning decisions and whether anticompetitive results were foreseeable from the authorization.

Since anticompetitive effects are foreseeable results of the authorized cooperative zoning efforts we infer that the legislature intended for the local governmental cooperative

action at issue here to be exempt from federal antitrust challenge.[6]

Boundary Agreement (water and annexation): The third conspiratorial act alleged in the complaint is the Villages' agreement to divide the unincorporated land lying between them so that each has the exclusive right to annex and to provide water service within a particular territory and to extract monopoly prices from developers within that territory who seek water service.

The Illinois Constitution, Art. VII, Section 10(a) entitled "Intergovernmental Cooperation" authorizes units of local government to "associate among themselves" to "transfer any power or function." Illinois statutory law gives localities the power to annex any unincorporated area that is contiguous to its corporate limits, Ill. Ann. Stat. ch. 24, ¶ 7-1-1 (Smith-Hurd 1985 pocket part), and to provide water service to residences outside their boundaries, Ill. Ann. Stat. ch. 24, ¶ 11-149-1 (Smith-Hurd 1985 pocket part).

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[6] Although the parties have not briefed the issue (except for a footnote reference in the State of Illinois' Amicus brief), we think that the claim regarding the zoning decision may be barred by the *Noerr-Pennington* doctrine, another exemption that the Supreme Court has read into the Sherman Act. This doctrine bars Sherman Act suits against persons who associate for the purpose of restraining trade and competition if they pursue this purpose through legitimate political means. *See Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965); *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972) (limiting *Noerr-Pennington* to legitimate, non-abusive political conduct); *Racetrac Petroleum, Inc. v. Prince George's County*, 601 F. Supp. at 908-910 (setting forth the doctrine in greater detail). As we understand the complaint (as amended by the brief) it charges that the Villages violated the Sherman Act by associating together in an attempt to persuade the county Board to deny the special permit and that they did so for anticompetitive purposes. The complaint contains no intimation that the Villages abused the political process in seeking to convince the County to deny the special zoning permit. This sort of association for purposes of influencing governmental action would appear to be exempt from antitrust challenge under *Noerr-Pennington*.

In agreeing to divide the unincorporated territory lying between them for purposes of water service and annexation the Villages did nothing more than "transfer" powers they had been given by the Illinois State legislature. Furthermore, the Village of Lisle's refusal to deal with Hobson Greene for provision of water pursuant to the boundary agreement is authorized by Ill. Ann. Stat. ch. 24, ¶ 11-149-1 (Smith-Hurd 1985 pocket part) which has been interpreted as authorizing localities to decline to provide water service to residences outside their boundaries. *See Exchange National Bank of Chicago v. Behrel*, 9 Ill. App. 3d 338, 341, 292 N.E.2d 164, 166 (1st Dist. 1972) (¶ 11-149-1's provision that municipality "may" provide for extension of municipal sewers and water main implies that such extension of service is discretionary).

This authorization to associate for the purpose of transferring power foreseeably reduces intergovernmental competition. The constitutional provision encouraging cooperation and exchange of powers in this and other areas reflects a legislative concern that competition between municipalities may not always accord with the public interest and reflects a decision that antitrust policies such as efficiency and competition should at times give way to others. *Cf. Town of Hallie*, 105 S. Ct. at 1718, n.5 (Wisconsin statute permitting municipality to enter cooperative agreements for provision of sewage treatment has foreseeable anticompetitive effects). The authorization for municipalities to refuse to provide water service beyond boundaries also has foreseeable anticompetitive results. *Cf. Town of Hallie*, 105 S. Ct. 1713 (Wisconsin statute authorizing City to provide sewage service and giving City right to decline service to those residing beyond its boundaries has foreseeable anticompetitive effects).

Because the State of Illinois has authorized the association of municipalities for the purpose of transferring powers and authorized the municipalities' refusal to provide water service to residences beyond their borders, and because these authorizations have foreseeable anticompetitive consequences we hold that the boundary agreements

constitute state action and are exempt from antitrust challenge.

For the foregoing reasons we REVERSE the district court order and remand to the district court with directions to dismiss this federal antitrust action against the defendants.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

JUDGMENT—ORAL ARGUMENT

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

November 18, 1985.

Before

Hon. HARLINGTON WOOD, JR., *Circuit Judge*
Hon. THOMAS E. FAIRCHILD, *Senior Circuit Judge*
Hon. ROBERT A. GRANT, *Senior District Judge**

LASALLE NATIONAL BANK OF CHICAGO, et al.,
Plaintiffs-Appellees,

No. 84-2684 vs.

THE COUNTY OF DUPAGE, et al.,
Defendants-Appellants.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.
No. 82 C 6517—Judge Paul E. Plunkett.

This cause was heard on the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby REVERSED, with costs, and the case is REMANDED, with instructions, in accordance with the opinion of this Court filed this date.

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* The Honorable Robert A. Grant, Senior District Judge of the Northern District of Indiana, is sitting by designation.

APPENDIX C

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

January 16, 1986.

Before

Hon. HARLINGTON WOOD, JR., *Circuit Judge*
Hon. THOMAS E. FAIRCHILD, *Senior Circuit Judge*
Hon. ROBERT A. GRANT, *Senior District Judge**

LASALLE NATIONAL BANK OF CHICAGO, et al.,
Plaintiffs-Appellees,

No. 84-2684 vs.

THE COUNTY OF DUPAGE, et al.,
Defendants-Appellants.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.
No. 82 C 6517—Paul E. Plunkett, *Judge.*

* The Honorable Robert A. Grant, Senior District Judge of the Northern District of Indiana, is sitting by designation.

Judges Bauer and Easterbrook did not participate in any consideration of the petition for rehearing *in banc* filed in the above cause.

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *in banc* filed in the above-entitled cause by plaintiffs-appellees on December 26, 1985, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

APPENDIX D

15 U.S.C. § 1

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

15 U.S.C. § 2

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

15 U.S.C. § 15(a)

Except as provided in subsection (b) of this section, any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in con-

troversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. * * *

15 U.S.C. § 26

Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18, and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: *Provided*, That nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provisions of subtitle IV of Title 49, in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission. In any action under this section in which the plaintiff substantially prevails, the court shall award the cost of suit, including a reasonable attorney's fee, to such plaintiff.

Illinois Constitution, Art. VII, § 10(a)

Units of local government and school districts may contract or otherwise associate among themselves, with the State, with other states and their units of local government and school districts, and with the United States to obtain or share services and to exercise, combine, or transfer any power or function, in any manner not prohibited by law or by ordinance. Units of local government and school districts may contract and otherwise associ-

ate with individuals, associations, and corporations in any manner not prohibited by law or by ordinance. Participating units of government may use their credit, revenues, and other resources to pay costs and to service debt related to intergovernmental activities.

Ill. Rev. Stat. ch. 24, § 7-1-1

Any territory which is not within the corporate limits of any municipality but which is contiguous to a municipality, may be annexed thereto as provided in this Article. For the purposes of this Article any territory to be annexed to a municipality shall be considered to be contiguous to the municipality notwithstanding that such territory is separated from the municipality by a railroad right-of-way, but upon such annexation the area included within such right-of-way shall not be considered to be annexed to said municipality.

When any land proposed to be annexed is part of any Fire Protection District or of any Public Library District, and the annexing municipality provides fire protection or a public library, as the case may be, the Trustees of each District shall be notified in writing by certified or registered mail before any court hearing or other action is taken for annexation. Such notice shall be served 10 days in advance. An affidavit that service of notice has been had as provided by this Section must be filed with the clerk of the court in which such annexation proceedings are pending or will be instituted or, when no court proceedings are involved, with the recorder for the county where such land is situated. No annexation of such land is effective unless service is had and the affidavit filed as provided in this Section.

The new boundary shall extend to the far side of any adjacent highway and shall include all of every highway within the area annexed. These highways shall be considered to be annexed even though not included in the legal description set forth in the petition for annexation. When any land proposed to be annexed includes any high-

way under the jurisdiction of any township, the Township Commissioner of Highways and the Board of Town Trustees shall be notified in writing by certified or registered mail before any court hearing or other action is taken for annexation. If any municipality has annexed any area before October 1, 1975 and the legal description in the petition for annexation did not include any adjacent highway, any such annexation shall be valid and any highway adjacent to the area annexed shall be considered to be annexed notwithstanding the failure of the petition to annex to include the description of any adjacent highway.

Any annexation, disconnection and annexation, or disconnection under this Article of any territory must be reported by certified or registered mail by the corporate authority initiating such action to the election authorities having jurisdiction in the territory and the post office branches serving the territory within 30 days of such annexation, disconnection and annexation, or disconnection.

Failure to give such notice to the required election authorities or post office branches will not invalidate such annexation or disconnection. For purposes of this section "election authorities" means the county clerk where such clerk acts as the clerk of elections or the clerk of the election commission having such jurisdiction.

No annexation, disconnection and annexation, or disconnection under this Article of territory having electors residing therein made (1) prior to any primary election to be held within the municipality affected thereby and after the time for filing petitions as a candidate for nomination to any office to be chosen at such primary election, or made (2) within 60 days prior to any general election to be held within such municipality, shall be effective until the day after the date of such primary or general election, as the case may be.

For the purpose of this Section, a toll highway or connection between parcels via an overpass bridge over toll highway, shall not be considered a deterrent to the definition of contiguous territory.

Ill. Rev. Stat. ch. 24, § 11-147-4

Any municipality lying wholly or partly within the boundaries of any county which accepts the provisions of "An Act in relation to water supply, drainage, sewage, pollution and flood control in certain counties," approved July 22, 1959, as heretofore or hereafter amended, may contract with such county for water supply or sewerage service to or for the benefit of the inhabitants of the municipality. Any such contract may provide for the periodic payment to the county of a share of the amounts necessary to pay or provide for the expenses of operation and maintenance of the waterworks or sewerage system or the combined waterworks and sewerage system (including insurance) of the county, to pay the principal of and interest on any revenue bonds issued by the county hereunder, and to provide an adequate depreciation fund and to maintain other reserves and sinking funds for the payment of the bonds or the extension or improvement of the waterworks properties or sewage facilities of the county or a combination thereof, as the case may be.

Any such contract may be entered into without making a previous appropriation for the expense thereby incurred. Any such contract may be for a term not in excess of 20 years, if the contract is a general obligation of the municipality, or for a term not in excess of 40 years, if the obligation under the contract is payable solely from the revenues derived by the municipality from its water supply or sewerage system.

If the contract is payable solely from the revenues derived by the municipality from its water supply or sewerage system, the amounts due under the contract shall be deemed an expense of operating and maintaining the water supply or sewerage system of the municipality.

Ill. Rev. Stat. ch. 24, § 11-149-1

The corporate authorities of a municipality may provide by ordinance for the extension and maintenance of municipal sewers and water mains, or both, in specified areas

outside the corporate limits. Such service shall not be extended, however, unless a majority of the owners of record of the real property in the specified area petition the corporate authorities for the service.

Ill. Rev. Stat. ch. 34, § 3111

The county board shall have authority to control and regulate the disposal of sewage, refuse and other putrescible, infectious and otherwise objectionable wastes from any premises within the boarders of the county and to this end may adopt suitable ordinances.

The county is hereby authorized to construct or purchase and operate a waterworks system or a sewerage system or a combined waterworks and sewerage system and to improve or extend any such system so acquired from time to time, as provided in this Act. The county may furnish water or sewerage service or combined water and sewerage service to individuals, municipal corporations or other corporations and may impose and collect charges or rates for furnishing water or sewerage service or combined water and sewerage service, as provided in this Act. Any county which owns and operates or which may hereafter own and operate a waterworks system or a sewerage system or a combined waterworks and sewerage system may enter into and perform contracts, whether long-term or short-term, with any municipal, public utility or other corporation, or any person or firm, for the furnishing by the county of water or sewerage service or combined water and sewerage service. Such contracts may provide for periodic payments to the county of a share of the amounts necessary to pay or provide for the expenses of operation and maintenance of the waterworks system or sewerage system or the combined waterworks and sewerage system (including insurance), to pay the principal of and interest on any revenue bonds issued hereunder, and to provide an adequate depreciation fund as hereinafter provided and to maintain such other reserves and sinking funds as may be deemed necessary or

desirable by the county for the payment of the bonds or the extension or improvement of the waterworks properties or sewerage facilities or a combination thereof, as the case may be. Any county may also enter into and perform contracts, whether long-term or short-term, with any such corporation, person or firm for the leasing, management or operation of a waterworks system or a sewerage system or a combined waterworks and sewerage system.

Ill. Rev. Stat. ch. 34, § 3151

For the purpose of promoting the public health, safety, morals, comfort and general welfare, conserving the values of property throughout the county, lessening or avoiding congestion in the public streets and highways, and lessening or avoiding the hazards to persons and damage to property resulting from the accumulation or runoff of storm or flood waters, the board of supervisors or board of county commissioners, as the case may be, of each county, shall have the power to regulate and restrict the location and use of buildings, structures and land for trade, industry, residence and other uses which may be specified by such board, to regulate and restrict the intensity of such uses, to establish building or setback lines on or along any street, trafficway, drive, parkway or storm or floodwater runoff channel or basin outside the limits of cities, villages and incorporated towns which have in effect municipal zoning ordinances; to divide the entire county outside the limits of such cities, villages and incorporated towns into districts of such number, shape, area and of such different classes, according to the use of land and buildings, the intensity of such use (including height of buildings and structures and surrounding open space) and other classification as may be deemed best suited to carry out the purposes of this Act; to prohibit uses, buildings or structures incompatible with the character of such districts respectively; and to prevent additions to and alteration or remodeling of existing buildings or structures in such a way as to avoid the restrictions and limitations lawfully imposed hereunder: Provided, that

permits with respect to the erection, maintenance, repair, alteration, remodeling or extension of buildings or structures used or to be used for agricultural purposes shall be issued free of any charge. In all ordinances or resolutions passed under the authority of this Act, due allowance shall be made for existing conditions, the conservation of property values, the directions of building development to the best advantage of the entire county, and the uses to which property is devoted at the time of the enactment of any such ordinance or resolution.

The powers by this Act given shall not be exercised so as to deprive the owner of any existing property of its use or maintenance for the purpose to which it is then lawfully devoted; nor shall they be exercised so as to impose regulations or require permits with respect to land used or to be used for agricultural purposes, other than parcels of land consisting of less than 5 acres in counties with a population in excess of 500,000, or with respect to the erection, maintenance, repair, alteration, remodeling or extension of buildings or structures used or to be used for agricultural purposes upon such land except that such buildings or structures for agricultural purposes may be required to conform to building or set back lines; nor shall any such powers be so exercised as to prohibit the temporary use of land for the installation, maintenance and operation of facilities used by contractors in the ordinary course of construction activities, except that such facilities may be required to be located not less than 1,000 feet from any building used for residential purposes, and except that the period of such temporary use shall not exceed the duration of the construction contract; nor shall any such powers include the right to specify or regulate the type or location of any poles, towers, wires, cables, conduits, vaults, laterals or any other similar distributing equipment of a public utility as defined in an Act entitled "An Act concerning Public Utilities", if the public utility is subject to The Messages Tax Act, The Gas Revenue Tax Act or The Public Utilities Revenue Act, or if such facilities or equipment are located on any rights of way and are used for railroad purposes.

Nothing in this Act shall be construed to restrict the powers granted by statute to cities, villages and incorporated towns as to territory contiguous to but outside of the limits of such cities, villages and incorporated towns. Any zoning ordinance enacted by a city, village or incorporated town shall supersede, with respect to territory within the corporate limits of the municipality, any county zoning plan otherwise applicable. The powers granted to counties by this Act shall be treated as in addition to powers conferred by statute to control or approve maps, plats or subdivisions.

This amendatory Act of 1971 does not apply to any county which is a home rule unit.

This amendatory Act of 1972 does not apply to any county which is a home rule unit.

Ill. Rev. Stat. ch. 34, § 3159

In the exercise of powers conferred by this Act the county board of any county shall have authority to cooperate with other counties, with cities, villages or other municipal corporations either within or without such county, and with municipal or state authorities, and to appoint such committee or committees as it may think proper to effect such cooperation.

Ill. Rev. Stat. ch. 111½, § 1004(n)

The [Environmental Protection] Agency shall have authority, consistent with Section 5(c) and other provisions of this Act, and for purposes of Section 303(e) of the Federal Water Pollution Control Act Amendments of 1972, (P. L. 92-500), to engage in planning processes and activities and to develop plans in cooperation with units of local government, state agencies and officers, and other appropriate persons in connection with the jurisdiction or duties of each such unit, agency, officer or person. Public hearings shall be held on the planning process, at which any person shall be permitted to appear and be heard, pursuant to procedural regulations promulgated by the Agency.

Ill. Rev. Stat. ch. 111½, § 1046(b)

In order to be eligible for federal grants for construction of sewage works pursuant to Section 201(g) of the Federal Water Pollution Control Act Amendments of 1972 (P.L. 92-500), any sanitary district, drainage district, municipality, county, special district or other unit of local government established pursuant to State law, that owns or operates sewage works may adopt, in accordance with such unit's statutory procedures, ordinances or regulations to provide for systems of proportionate cost sharing for operation and maintenance by recipients of such unit's waste treatment services, to provide for payments by industrial users of costs of sewage works construction allocable to the treatment of industrial wastes, and to provide such other capabilities as may be necessary to comply with Sections 204(b), 307, and 308 of the Federal Water Pollution Control Act Amendments of 1972 (P.L. 92-500).

APPENDIX E

[Received October 25, 1982]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No.

LASALLE NATIONAL BANK OF CHICAGO, as Trustee under Trusts Numbered 40244, 53645, 100385 and 100386, UNITY VENTURES, and WILLIAM ALTER,

Plaintiffs,

vs.

THE COUNTY OF DUPAGE, a body politic; THE BOARD OF COMMISSIONERS OF DUPAGE COUNTY, a body politic; THE VILLAGE OF LISLE, a municipal corporation; and THE VILLAGE OF WOODRIDGE, a municipal corporation,

Defendants.

Jury Trial Demanded

COMPLAINT

Plaintiff complains of the defendants and each of them as follows:

I. INTRODUCTION

Nature of the Action

1. Plaintiffs bring this action for money damages and declaratory and injunctive relief because of defendants' agreement, conspiracy, and concert of action in violation of the anti-trust laws, whereby defendants sought to, and continue to, suppress competition in luxury residential and commercial development in the Chicago metropolitan area, and specifically in a certain section of DuPage County through a series of illicit agreements between and among the defendants and various other persons and entities unknown to plaintiff at this time. The defendants' purpose, and the effect of their actions, was and is to control the market for new luxury residential and commercial development in their own parochial interests and to unreasonably restrain competition, to the specific damage of individual developers, including plaintiffs.

II. JURISDICTION

2. The jurisdiction of this Court is invoked under Sections 4 and 16 of the Clayton Act, as amended, 15 U.S.C. §§15 and 26, and 28 U.S.C. §§1337 and 2201 for violations of Section 1 of the Sherman Act, 15 U.S.C. §1, and Section 2 of the Sherman Act, 15 U.S.C. §2.

3. Venue exists by virtue of Sections 4 and 12 of the Clayton Act, as amended, 15 U.S.C. §§15 and 22, and 28 U.S.C. §1391(c). Each of the defendants resides, is found, has an agent, transacts business or is doing business within the Northern District of Illinois; moreover, the unlawful activities complained of herein were carried out within this District.

III. PARTIES

Plaintiffs

4. Plaintiff LaSalle National Bank of Chicago is the legal title holder of approximately 145 acres of land (the

"Greene Farm") located in an unincorporated section of DuPage County as trustee under trust agreements numbered 40244, 53645, 100385 and 100386.

5. Plaintiff William Alter ("Alter") is a beneficiary of the land trusts described above. Alter is and has been engaged in the development of the Greene Farm as a project known as the Hobson Greene Development ("Hobson Greene") discussed in detail hereafter. Alter is also the managing partner of Unity Ventures described in the next paragraph.

6. Plaintiff Unity Ventures is an Illinois partnership with its principal place of business in Wilmette, Illinois. Its business activities include the development and management of the Hobson Greene Development. It is also a beneficiary of certain of the land trusts described in paragraph 4.*

Defendants

7. Defendant County of DuPage ("DuPage County") is a local governmental unit and body politic, established and governed by the Constitution and laws of the State of Illinois.

8. Defendant Board of Commissioners of DuPage County (the "Commissioners") is a body politic designated by statute to govern and administer the affairs of DuPage County, as set out hereafter.

9. Defendant Village of Lisle ("Lisle") is a municipal corporation and body politic of the State of Illinois located in DuPage County, Illinois.

10. Defendant Village of Woodridge ("Woodridge") is a municipal corporation and body politic of the State of Illinois located in DuPage County, Illinois.

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* All plaintiffs are hereafter collectively described as "plaintiff" unless otherwise indicated.

IV. THE RELEVANT MARKET

A. *The Market For Luxury Housing*

11. Greene Farm is located in the Chicago metropolitan area. Within the Chicago metropolitan area, developers compete to provide luxury housing to upper income individuals who live, or plan to live, in the area. Developers also compete to develop commercial properties designed to serve these individuals. Such development is financed through capital markets which operate nation wide, and utilizes building equipment and materials manufactured nation wide.

12. This luxury type housing is not scattered randomly throughly the Chicago metropolitan area; rather, it is concentrated in a few communities which have developed a reputation as "desirable" places to live. Examples of such communities in the Chicago area are Oakbrook, Wayne, Lake Forest and Barrington.

B. *The Greene Area*

13. The area surrounding Greene Farm in DuPage County is one of the areas in the Chicago metropolitan area which is generally considered "desirable," and is thus an area where developers seek to build and market housing designed for upper income persons. This area consists of approximately 1,500 acres, bounded on the north by Maple Road, on the west by Naperville, on the south by the Greene Valley Forest Preserve, and on the east by Illinois Route 53. (This area is hereafter referred to as the "Greene Area"). Much of this area is located in the unincorporated section of DuPage County. The Village of Lisle and Woodridge are located on the eastern edge of this area.

14. Prior to 1970, the Greene Area was an area of low population density and relative low land values. Because the Greene Area was served by an existing network of roads and highways and public transportation, and because of its proximity to Chicago and other communities in the

Chicago metropolitan region, the Greene Area was and is ideally suited for a luxury type development, as described above.

15. Beginning in approximately 1970, developers, including plaintiff, commenced to acquire farm and other developed and undeveloped real property in the Greene Area for luxury commercial and residential development.

C. *The Hobson Greene Development*

16. Plaintiff acquired the Greene Farm property in approximately 1969 in order to create Hobson Greene, a development which, when it is completed, will consist of approximately 268 single family homes, 713 dwelling units of multiple family housing, a commercial center of stores, large open and recreational spaces, and equestrian trails leading to a County forest preserve east of Hobson Greene.

17. The Greene Area which surrounds Hobson Greene is also largely unincorporated, consists of many large estates and is considered an extremely desirable and prestigious area. As more fully described hereafter, Woodridge at all times pertinent hereto desired to annex Hobson Greene into is corporate limits.

18. Because of the illegal conspiracy in restraint of trade described hereafter, plaintiff has been unable to complete Hobson Greene.

D. *Competition Between Developers*

19. Developers in the Greene Area at all times pertinent hereto compete and have competed in the sale and rental of upper income residential and commercial structures (hereafter described as "developments").

20. In order to successfully complete a development and otherwise compete effectively with other developers in the Greene Area and in the Chicago metropolitan area generally, a developer must obtain, among other things,

appropriate zoning, water service, and sewer service to dispose of the sewage that the development generates.

21. In the Greene Area, the local governments of the County of DuPage and the Villages of Lisle and Woodridge control the zoning, water and sewer services required by developers like plaintiff.

E. *Competition Between Local Government Units*

22. In addition to the competition among developers in the Greene Area in the manner just described, various local governmental units in that area also compete with each other to provide certain profitable utility services, like water service, to new developments.

23. In addition, municipalities in the Greene Area compete with each other to annex certain developments which, if annexed to a particular municipality, will upgrade the public image and reputation of the municipality, increase the tax base of the municipality and will otherwise benefit the municipality.

24. At all times pertinent hereto, a developer of property located in the unincorporated part of the Greene Area normally approaches the County and one or more adjacent or nearby municipalities to determine the zoning, permit and annexation fees, land donations, and other requirements and benefits that each offers or requires of a developer located within its jurisdiction. A developer then agrees to annex his property to that municipality which offers the most attractive mix of benefits and requirements for annexation. However, if no municipality offers an attractive mix of benefits or requirements for annexation, the developer will then cause his development to remain in an unincorporated area of Central DuPage County.

V. CONSPIRACY IN RESTRAINT OF TRADE

25. Beginning in or about 1971, Lisle, Woodridge, the County of DuPage, and various other local government units, government officials, and developers, unknown to

plaintiff at this time, entered into an agreement, conspiracy and concert of action in the Greene Area to restrain competition among developers of property for commercial and residential purposes, and among local governmental units in the manner described herein. As part of this conspiracy, defendants used, among other mechanisms, a series of contracts and agreements among and between the municipalities which defined territories within which each municipality had the exclusive right to annex developments in the unincorporated parts of the Greene Area and to otherwise impose anti-competitive conditions upon developers of property in the Greene Area. This conspiracy is continuing in nature.

26. In particular, and without limitation, the defendants conspired and agreed to eliminate competition in residential and commercial developments by the following means:

(a) In or about 1971, defendants entered into a series of agreements regulating the provision of sewer service in Central DuPage County;

(b) In or about 1974, the defendants entered into an agreement to deny William Alter a special use permit for which he had applied to the DuPage County Zoning Board of Appeals, and without which the Hobson Greene development would not proceed.

(c) In or about 1978, defendants entered into a series of agreements which set boundaries within which each local government unit is given the exclusive right to annex new developments and to provide utility services to new developments; and

(d) On August 13, 1980, the defendants entered into an agreement to geographically allocate the available sewage capacity among the defendants.

27. The purpose and effect of this agreement, conspiracy and concert of action was and is to depress the ordinary competition between developers within the Greene Area, and between developers in the Greene Area and developers

of luxury housing in other parts of the Chicago metropolitan area and between local government units. This conspiracy has had an effect on a substantial amount of interstate commerce.

VI. OVERT ACTS

A. *1971 Sewage Service Agreements Allocating Territory And Capacity*

28. On or about November 2, 1971, DuPage County and Woodridge entered into an agreement relating to the provision of sewer service in Woodridge and certain areas of unincorporated DuPage County. A copy of this agreement is attached as Exhibit A.

29. This agreement (Section 2, Paragraph A) provides:

> The Village shall have complete determination of sewer service extensions to those areas outside the Village limits which will be served by the existing Village sewer system or as the same shall from time to time be expanded and the County shall provide treatment service to such areas.

30. This Agreement further provides (Section 2, Paragraph E):

> In the event of a requirement that the sewage treatment plant capacity be subject to allocation or reservation of excess capacity, the Village shall have the right of first refusal with respect to such allocation or reservation to the extent of service applicable to not less than 1,000 connections per year, for the first 5 years after said requirement and not less than 650 per year thereafter.

31. Plaintiffs are informed and believe that the Village of Lisle entered into a similar agreement for sewer service with DuPage County in or about 1971, and that this agreement contained similar language allocating sewer service territory and capacity.

B. *Conspiracy To Block Zoning For Hobson Greene*

32. On May 18, 1970, plaintiff filed a petition with the DuPage County Zoning Board of Appeals which requested that a special use permit be granted for a planned unit development ("PUD") on the Greene Farm property. This permit would have allowed plaintiff to proceed with the Hobson Greene Development, as described above.

33. Although defendant DuPage County granted a special use permit for an essentially identical planned development directly north of plaintiff's property, on December 24, 1974 the County Board finally denied the permit as to the Greene Farm property.

34. After three years of litigation, the Illinois Appellate Court held that the County's denial of the special use permit was improper. (*LaSalle National Bank v. County of DuPage*, 54 Ill.App.3d 387, 369 N.E.2d 505 (2d Dist. 1977).)

C. *Agreements To Allocate Territory For Future Annexation*

35. In or about 1978, and possibly beginning at an earlier date, the defendants Lisle, Woodridge and other municipalities unknown to plaintiff at this time entered into a series of agreements whereby each municipality was assigned a particular territory within which it would have the exclusive right to annex territory. Each defendant agreed not to annex any development or other property located in another local government's territory.

36. As a part of the allocation of territory for future annexation described above, the defendants agreed to respect these boundaries in regard to the provision of utility services. In particular, each municipality agreed not to provide water service to any property located within another unit's territory.

D. *Woodridge's Tying Of Water Service To Annexation*

37. In 1978, William Alter approached the Village of Woodridge to request water service for the proposed Hobson Greene Development.

38. Woodridge refused to provide such service, unless plaintiffs agreed to annex the Greene property to Woodridge.

39. Thereafter, defendant Village of Lisle refused to consider providing water service to the proposed development, because it was in Woodridge's territory.

E. *1980 Allocation Of Sewage Treatment Capacity*

40. On April 25, 1979, the Illinois Environmental Protection Agency ("IEPA") determined that the sewage treatment facilities in central DuPage County were over burdened. The IEPA sought to place a freeze on all further connections to the area sewage treatment facilities until such time as the capacity of the facilities was increased.

41. The defendants were unwilling to accept such a limitation on growth within their respective territories. After a series of discussions between the defendants and the IEPA, the IEPA agreed to allow a certain number of connections (measured in population equivalent or "P.E.") in return for the upgrading of the local sewage treatment facilities.

42. In furtherance of the conspiracy to allocate territory for new development, described herein, the defendants entered into an agreement between themselves allocating the P.E. allowed by the IEPA among themselves.

43. This allocation of P.E. was agreed upon among the defendants without giving any developer, including plaintiff, who had a vested interest in P.E. pursuant to a valid IEPA permit, notice or an opportunity to be heard. In particular, the defendants agreed to allocate the available P.E. in an arbitrary and capricious manner which assigned

a disproportionate amount of P.E. to the Villages of Lisle and Woodridge.

VII. UNREASONABLE RESTRAINT ON INTERSTATE COMMERCE

44. The intent, tendency and inherent nature of the aforesaid agreement, combination, conspiracy and concert of action represent and constitute an unreasonable restraint on interstate commerce in that residential and commercial development in the Greene Area is and will continue to be governed by the agreements entered into among and between the various local governmental entities, rather than by the unfettered competition between the developers and between the various local governments. In particular, developers or potential developers of property in the central DuPage County area will be foreclosed from negotiating for favorable terms with various local government entities and instead will be forced to accept whatever terms the local government within whose territory the developer's property is located is willing to offer. This agreement, combination, conspiracy and concert of action has dis[s]uaded and will continue to dis[s]uade developers from acquiring and developing property in the Greene Area, thus lessening competition in the luxury housing market in the Chicago metropolitan area generally. Additionally, the 1980 agreement allocating the remaining sewage treatment capacity eliminates competition among the developers in the Greene Area. Rather than competing with all other developers in the area for sewage service, each developer will only be able to compete with other developers in the particular territory where its property is located, and each developer will only be able to compete for a limited portion of the total sewage capacity.

VIII. SPECIAL INJURY TO PLAINTIFF

45. Plaintiff's property is located in unincorporated DuPage County within the Woodridge development ter-

ritory. As a result of the conspiracy complained of herein, plaintiffs have been unable to develop their property as originally contemplated. The defendants' actions have forced plaintiffs to substantially redesign the Hobson Greene Development with the result that the development will be substantially less profitable. Additionally, defendants' actions have caused significant delay in plaintiffs' development of the Greene Farm property substantially increasing the cost of the Hobson Greene Development and jeopardized the development entirely.

46. In particular and without limitation, plaintiffs have been damaged by defendants' allocation of territory in the following instances:

(a) In 1979, plaintiffs obtained a permit from the IEPA allowing them to connect the Hobson Greene sewage system into the central DuPage County area sewage treatment system. As a result of the defendant's agreement to allocate the remaining P.E., described above at paragraphs 28-31 the total sewage capacity allocated to unincorporated DuPage County, where the Greene Farm property is located, is less than the amount of sewage for which plaintiffs have a permit. Therefore, plaintiffs have not been and will not be able to exercise their rights under their permit.

(b) The delay caused by the County Board's arbitrary and capricious denial of plaintiff's petition for a special use permit, described in paragraphs 32-34 above, has caused plaintiff to delay its development for three years, and to incur substantial attorneys fees.

(c) Defendant Village of Woodridge's wrongful refusal to provide the Greene Farm property with water service, described in paragraphs 25-27 above, forced plaintiffs to substantially decrease the density of the proposed Hobson Greene Development, thereby greatly reducing the potential profitability of the development project.

47. As a result of the above-described wrongful conduct of defendants, plaintiffs' development of the Hobson Greene project has been substantially delayed and plain-

tiffs have had to incur substantial additional costs. In particular and without limitation plaintiffs have suffered the following damage as a result of defendants' wrongful conduct described above:

(a) Increased interest overhead, including office and other personnel who must be employed but have been unable to work on the development and assorted carrying costs for the Greene Farm property.

(b) Lost profit from their inability to effect the Hobson Greene development plan as originally formulated.

(c) Attorneys fees and related costs of challenging defendants' conduct in various state court and administrative forums.

(d) Lost profit from additional developmental activities which plaintiffs could have undertaken but for defendants' conduct.

IX. RELIEF

WHEREFORE, plaintiff prays:

A. That this Court declare the boundary agreements between and among the Villages of Lisle, Woodridge, and unknown entities, and the August 31, 1980 agreement between and among the defendants to be in violation of Sections 1 and 2 of the Sherman Act;

B. That this Court issue a temporary restraining order, preliminary injunction and permanent injunction enjoining the defendants from enforcing all territorial agreements, service territory allocation agreements, or sewage capacity allocation agreements, or entering into any such further agreements in the future;

C. That plaintiffs recover compensatory damages in the amount of $25,000,000 or such greater or lesser amount as determined by a jury, to be trebled according to law;

D. That plaintiffs recover their costs and attorney fees in this suit; and

E. That plaintiffs have such other and further relief as the Court may deem just.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

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Petitioners,

v.

THE COUNTY OF DuPAGE, a body politic, THE BOARD OF COMMISSIONERS OF DuPAGE COUNTY, a body politic, THE VILLAGE OF LISLE, a municipal corporation, and
THE VILLAGE OF WOODRIDGE, a municipal corporation,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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REASON FOR DENYING THE WRIT

The Seventh Circuit's decision is fully consistent with its decision in the *Town of Hallie* case which was unanimously affirmed by this Court last term. Therefore, this case is not appropriate for review by way of Certiorari.

ARGUMENT

I. The Premise on Which the Petition is Based is Fallacious.

Petitioner (hereinafter "plaintiffs") commences its Petition for Writ of Certiorari ("Petition") with the following wholly inaccurate description of this case.

> This case brings to this Court the issue of first impression whether general state laws allowing units of local government to cooperate can be read to create broad immunity for anticompetitive concerted action by local government units even when the particular actions at issue are not authorized by state law. *Petition,* p. 3.

Plaintiffs proceed from this fallacious premise—that this case involves only "general state laws" permitting cooperation with no authorization of the "particular actions at issue"—and contend that the state authorization here is no more than the sweeping grant of home rule powers in *Boulder. Community Communications Co. v. City of Boulder,* 455 U.S. 40 (1982). However, a reading of plaintiffs' Complaint, as analyzed by the Seventh Circuit, confirms that this is quite a different case from the one mis-described by plaintiffs; not one of "first impression," but one which was addressed by this Court last term and unanimously decided adversely to plaintiffs. *Town of Hallie v. City of Eau Claire,* 105 S.Ct. 1713 (1985).

Here, each of the cooperative acts, characterized by plaintiffs as being only generally authorized, were in fact expressly state authorized. The units of local government were not merely told to go forth and "do as they please...," as in *Boulder,* 455 U.S. at 55. Rather, here the defendants were told by the state legislature (1) that communities abutting unincorporated areas are authorized to participate in the county rezoning process; (2) that municipalities are not required to extend utilities (including water) beyond their boundaries, and they are expressly authorized to enter into boundary agreements, allocating unincorporated territory lying between them for annexation by each; and (3) that units of local government are state authorized jointly to address, with the Illinois Environmental Protection Agency, the collection and treatment of sewage.

Thus, the conduct characterized in plaintiffs' Complaint as an antitrust conspiracy was nothing more than state authorized cooperation and joint action directed to specific, underlying conduct which was itself independently state authorized. The

obvious consequences predictably would not be the unbridled "competition" desired by plaintiffs, but rather the cooperative, joint intergovernmental activity desired and authorized by the legislature of the State of Illinois. This Court ruled unanimously last term that foreseeably anticompetitive consequences of expressly state authorized conduct were immune from antitrust prosecution under the state action doctrine first announced in *Parker v. Brown,* 317 U.S. 341 (1943). *Town of Hallie v. City of Eau Claire,* 105 S.Ct. 1713 (1985). Accord, *Fisher v. City of Berkeley,* 106 S.Ct. 1045 (1986).

II. Each of The Cooperative Acts of Defendants was Expressly State Authorized.

Plaintiffs seek to avoid the controlling effect of *Town of Hallie* by claiming that their allegations of concerted action, or cooperation, among defendants distinguish this case and that the Court of Appeals failed to consider plaintiffs' allegations of concerted action "in determining what rule of immunity to apply." These contentions are without merit and provide no basis for review by this Court.

The very "concerted action" plaintiffs allege is precisely authorized under the Illinois Constitution and statutes. The Court of Appeals painstakingly measured the specific authorization of that "concerted action," and found that it met the standards of *Town of Hallie* and *Boulder.* Since both the objective conduct of the municipalities, and the joint nature of aspects of that conduct, were expressly authorized by statute, the Court of Appeals properly determined that *Boulder—Town of Hallie* state action immunity applied.

The following quotations from the opinion of the Seventh Circuit concisely summarize the express authorization of defendants' cooperative conduct:

> A. *Sewage Treatment.* The State of Illinois authorizes counties and municipalities to contract together and combine resources for the provision of sewage treatment. Ill. Ann. Stat. ch. 34, § 3111 (Smith-Hurd 1985 pocket part)(counties "may furnish... sewerage service...to municipal corporations...[and] may enter into and perform contracts...with any municipal[ity],... for the furnishing... of... sewerage service"); Ill. Ann. Stat. ch. 24, § 11-147-4 (Smith-Hurd 1962)("Any municipality lying wholly or partly within the boundaries of any county which accepts the provisions of 'An Act in relation to water supply, drainage, sewage, pollution and flood control in certain counties,' [Ill. Ann. Stat. ch. 34, § 3101-3123] may contract with such county for water supply or sewerage service to or for the benefit of the inhabitants of the municipality"); Ill. Ann. Stat. ch. 111-½, § 1046(b) (Smith Hurd) 1977)("in order to be eligible for federal grants for construction of sewage works pursuant to Section 201(g) of the Federal Water Pollution Control Act Amendment of 1972 (P.L. 92-500), any municipality, county, special district or other unit of local government ... that owns or operates sewage works may adopt ... ordinances or regulations to provide for systems of proportionate cost sharing for operation and maintenance by recipients of such unit's waste treatment services."). The legislature has also expressly authorized the IEPA "to engage in planning processes and activities and to develop plans in cooperation with units of local government ... in connection with the jurisdiction or duties of each such unit ...." Ill. Ann. Stat. ch. 111-½, § 1004(n) (Smith-Hurd 1977). *Petition,* Appendix pp. B-7 and B-8.
>
> B. *Zoning.* The Illinois state legislature has specifically granted counties the power to regulate zoning in unincorporated areas. Ill. Ann. Stat. ch. 34, § 3151 (Smith-Hurd 1985 pocket part). The legislature has also expressly authorized counties "to cooperate ... with cities, villages or other municipal corporations either within or without such county" in all matters relating to zoning. Ill. Ann. Stat. ch. 34, § 3159 (emphasis added)(Smith-Hurd 1960). We think that these statutes constitute State of Illinois authorization for consultation between the County

and Villages regarding the Developer's special use permit petition. *Petition,* Appendix, p. B-10.

C. *Boundary Agreement.* The Illinois Constitution, Art. VII, Section 10(a) entitled "Intergovernmental Cooperation" authorizes units of local government to "associate among themselves" to "transfer any power or function." Illinois statutory law gives localities the power to annex any unincorporated area that is contiguous to its corporate limits, Ill. Ann. Stat. ch. 24, § 7-1-1 (Smith-Hurd 1985 pocket part), and to provide water service to residences outside their boundaries, Ill. Ann. Stat. ch. 24, § 11-149-1 (Smith-Hurd 1985 pocket part). In agreeing to divide the unincorporated territory lying between them for purposes of water service and annexation the Villages did nothing more than "transfer" powers they had been given by the Illinois State legislature. Furthermore, the Village of Lisle's refusal to deal with Hobson Greene for provision of water pursuant to the boundary agreement is authorized by Ill. Ann. Stat. ch. 24, § 11-149-1 (Smith-Hurd 1985 pocket part) which has been interpreted as authorizing localities to decline to provide water service to residences outside their boundaries. See *Exchange National Bank of Chicago v. Behrel,* 9 Ill.App.3d 338, 341, 292 N.E.2d 164, 166 (1st Dist. 1972) (§ 11-149-1's provision that municipality "may" provide for extension of municipal sewers and water main implies that such extension of service is discretionary). *Petition,* Appendix, pp. B-13 and B-14.

The same Court of Appeals that decided the *Town of Hallie* case (which this Court unanimously affirmed last term), after an elaborate statutory analysis, here found express authorization for all of the conduct challenged by plaintiffs and concluded that the State of Illinois had expressly eschewed "competition," as the mechanism for allocating the resources in question, in favor of cooperation and regulation. Under *Parker v. Brown* and its progeny, through *Town of Hallie,* federal antitrust courts are required to respect such state legislative decisions. That is precisely what the Court of Appeals for the Seventh Circuit did here, following this Court's unanimous affirmance last term of its decision in *Town of Hallie.*

CONCLUSION.

Plaintiffs seek to persuade this Court to grant their Petition and review this case by ignoring the express and specific state authorization of defendants' cooperative activities. The opinion of the Court of Appeals, some of which is quoted above, exposes that fundamental flaw in plaintiffs' Petition, and fully refutes plaintiffs' effort to misstate the facts and applicable law.

WHEREFORE, for the foregoing reasons, defendants request that the Court deny plaintiffs' Petition.

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On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITIONERS' REPLY

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PETITIONERS' REPLY

Respondents contend that this case is simply *Town of Hallie*[1] revisited and that the Petition should be denied since nothing new is presented here. This representation is patently false and would surprise the two lower courts that certainly did not address this case as merely a reprise of *Hallie.*

(1) The District Court rejected the very arguments that respondents now make here, and its decision denying state action immunity is still correct:

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[1] *Town of Hallie v. City of Eau Claire,* 105 S.Ct. 1713 (1985).

> While these provisions authorize municipalities to cooperate in exercising their constitutional and statutory powers, they do not clearly and affirmatively authorize them to jointly engage in the anticompetitive conduct which Plaintiffs complain about here. In this regard, they are like the home rule provision in *Boulder* which gave the municipality the capacity to pass the cable television ordinance but did not authorize it to pursue the anticompetitive conduct that Plaintiffs complained about in their antitrust suit. By comparison, the Wisconsin statutes and case law involved in *Hallie* specifically authorize the anticompetitive actions which Defendants allegedly took. [Petition App. A-8; footnote omitted.]

(2) Even the Court of Appeals plainly did not view the matter as a repeat of *Hallie* since it found the state action issue to be "a close question." *LaSalle Nat. Bank v. DuPage County*, 777 F.2d 377, 379 (7th Cir. 1985). Indeed, the Court of Appeals' construction of a state action immunity based on a complex patchwork of disparate state constitutional provisions, statutes, and alleged "policies" belies the notion that this case is anything like *Hallie*.

It bears emphasis that in *Hallie* the specific local governmental action alleged to violate the antitrust laws was explicitly authorized by the state statute in question—there was *no* dispute about that. The *only* question raised for decision in this Court was whether there was a need for an express declaration by the legislature, either in the statute or in the legislative history, that the lawmakers intended for the local governmental unit to take action with foreseeably anticompetitive consequences. This Court held only that once the conduct in question has been specifically authorized by the state and anticompetitive consequences were reasonably foreseeable, there is no need for an express legislative statement about foreseeable anticompetitive consequences.

(3) Neither *Town of Hallie*, nor any other decision by any court except the Seventh Circuit in this case, has held that specific conduct that is admittedly *unauthorized* may still be immunized by the fact that the state has generally authorized its local governmental units to take action in the area in question. In this case, DuPage County's zoning decision was definitively ruled unconstitutional and improper by the Illinois courts, and yet the Seventh Circuit found the general zoning statute in Illinois to immunize *every* zoning action undertaken cooperatively by local governmental units. This holding, which obviously infects the entire decision below, turns the state action principle on its head and specifically repudiates *City of Boulder*.[2]

(4) Unlike this case, *Town of Hallie* did not deal at all with concerted action by units of local government. *Town of Hallie* dealt solely with one city's unilateral conduct. This distinction was the basis for the District Court's decision in this case, and the Seventh Circuit never really addressed it. The question is one of first impression for this Court.

(5) Ultimately respondents simply quote at length from the decision below and declare, by *ipse dixit*, that the Seventh Circuit opinion demonstrates that the challenged actions in question were specifically authorized. But even a cursory review of the statutes involved demonstrates that the Court of Appeals struggled to patch together a variety of constitutional provisions, state statutes, and supposed state policies to create a state action defense which the Illinois legislature itself had not contemplated.

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[2] *Community Communications Co. v. City of Boulder*, 455 U.S. 40 (1982).

Therefore, the questions raised by the Petition remain unanswered by respondents. They refuse to address the question whether *City of Boulder* requires a rejection of a state action defense where the units of local government rely on general "cooperation" statutes to shield their admittedly anticompetitive concerted action, which was itself found to be illegal under state law.

For these reasons, petitioners ask the Court to issue the writ of certiorari and address the important issues of antitrust law which this case presents but which the Court of Appeals failed to address forthrightly or correctly.

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